88-410

No. ———

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

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UNISYS CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

———

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

———

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NORMAN A. STEIGER
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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Federal Circuit ("Federal Circuit") may properly avoid enforcing the Order of Precedence clause, which is a widely used disputes prevention clause, by saying that patently inconsistent clauses can be harmonized, when Government procurement is about $200 billion a year and Government contract disputes already total billions of dollars?

2. Whether the Federal Circuit, contrary to established doctrine, may properly construe an ambiguous option provision in favor of rather than against the drafter and loosely rather than strictly?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. ———

SPERRY CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner, Sperry Corporation,[1] respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in this proceeding on April 21, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (App. at 1a-14a)[2] is reported at 845 F.2d 965. The opinion of the United States Claims

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[1] Sperry Corporation was merged into Burroughs Corporation as of November 12, 1986. Burroughs Corporation changed its name to Unisys as of November 13, 1986. Unisys has no parent company, subsidiaries or affiliates.

[2] "App." refers to the Appendix to this Petition.

Court (App. at 15a-39a) is reported at 9 Cl. Cts. 488. The opinion of the Armed Services Board of Contract Appeals (App. at 40a-76a) is reported at 83-2 BCA ¶ 16,841.

JURISDICTION

The judgment of the Court of Appeals (App. at 77a) was entered on April 21, 1988. A timely petition for panel rehearing was denied on June 9, 1988. (App. at 78a). This petition for certiorari was filed within 90 days after that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF CASE

By failing to apply the plainly applicable Order of Precedence clause, the Federal rule of construction against the drafter and the settled rule of strictly construing options, the Federal Circuit transformed a relatively routine case into an enormously important Government contract case justifying this Court's review. The result of the Federal Circuit's decision is to create chaos rather than doctrinal stability and increase disputes and litigation, which already involve billions of dollars. This decision undermines the very reason for the Federal Circuit's existence.

The Government spends about $200 billion a year for the purchase of a wide variety of products and services, including sophisticated weapons systems, construction of dams, roads, and buildings, and research and development to advance the state-of-the-art. Contract clauses and the Contract Disputes Act of 1978 provide carefully developed and coordinated contractual, administrative and judicial procedures to prevent and resolve Government contract disputes.

Most Government contracts contain special provisions tailored to fit the particular acquisition, general provisions included in all Government contracts, and a multitude of other documentary data such as statements of

work, drawings and specifications. Because inconsistencies inevitably exist among these provisions, the contracts contain an Order of Precedence clause. The Government developed the clause to serve the important function of specifying which provision in the contract the Government wants to be given priority, thereby resolving the inconsistency in accordance with the Government's intention and preventing a dispute and litigation.

The contract at issue was awarded to Petitioner to design, fabricate, test and deliver a LORAN navigation system (Item 0001). Special provisions, including a special acceptance provision tailored to meet the needs of this procurement, were included in "Part II The Schedule" and the Order of Precedence clause made the Schedule provisions controlling over other parts of the contract in the event of inconsistency. (App. at 45a).

The Schedule granted the Government option rights but limited the time within which the rights could be exercised to "the period specified in the Schedule." The period specified in the Schedule is "no later than 120 days after final acceptance by the Government of Item 0001," which was the first system. (App. at 27a). The Schedule specifies that final acceptance of Item 0001 occurs "upon successful completion of DT&E Field Test at destination" (App. at 27a), which was February 3, 1978. There are two other acceptance provisions in the contract, each providing for a time for acceptance different from each other and different from the acceptance clause in the Schedule. The dispute before the Federal Circuit was whether the Government timely exercised options to purchase additional navigation systems.

As the Claims Court pointed out, the various clauses for acceptance in the contract are inconsistent and one or more must fall. (App. at 32a). The acceptance event specified in the Schedule, which the Order of Precedence

clause makes controlling, occurred on February 3, 1978. (App. at 23a). The times of acceptance under the other two acceptance clauses could be as late as March 20, 1979. The time of acceptance found by the Federal Circuit was March 20, 1978, which is not the same as the time specified under any of the acceptance clauses or any place in the contract. It is sophistry for the Federal Circuit to conclude that these different times (February 3, 1978, March 20, 1978 and March 20, 1979) could be "harmonized" which was the Court's reason for not enforcing the Order of Precedence clause. Such a decision effectively nullifies the clause in the eyes of lawyers and the Government agencies and contractors who read and are guided by the Claims Court and Federal Circuit decisions.

Failure to give effect to the Order of Precedence clause, when plainly applicable, defeats the Government's intention in creating the clause and makes every inconsistency in a Government contract a potential dispute to be resolved through litigation. Because the "boilerplate" in Government contracts is so voluminous, these inconsistencies inevitably are found in large numbers. The disputes resolution process will not be able to handle the mountains of litigation that a *de facto* invalidation of the Order of Procedence clause will cause.

The acceptance clause in the Schedule should have been applied in accordance with its terms as required by the Order of Precedence clause, or if ambiguous, the Federal Circuit should have applied the well-established Federal rule of construction against the drafter. That Federal rule of contract construction is an extremely important Government contract principle. The failure of the Federal Circuit tc apply that principle to the instant case is contrary to this Court's decision in *United States v. Seckinger*, 397 U.S. 203, 210 (1970), and numerous Court of Claims and Federal Circuit decisions. In addition, the Court's failure to apply the well-settled strict construc-

tion of options rule now casts doubt upon its future viability in Government procurement.

Petitioner delivered the additional systems to the Government at the direction of the Contracting Officer and filed its claim for an equitable adjustment in the contract price on the basis that the option exercise was untimely.[3] The Contracting Officer and the Armed Services Board of Contract Appeals ("Board") denied Petitioner's claim (with a dissenting opinion at the Board). The Claims Court reversed the Board and entered judgment for Petitioner in the amount of $6,121,590. The Court of Appeals for the Federal Circuit sitting in a three judge panel reversed the Claims Court, with a concurring opinion stating that the basis for the majority decision was wrong. The Court denied a timely motion for panel rehearing and the suggestion for rehearing in banc.

The contract is a performance contract which required Petitioner to design and build a highly sophisticated LORAN navigational system. It was necessary for Petitioner to advance the state of the art to meet the performance requirements set by the Government. (App. at 41a). The Government needed additional systems, but before ordering them, wanted to know that the first system (Item 0001) met the performance requirements. Successful completion of the DT&E Field Test provided that crucial information. The Board found that ". . . these tests demonstrated the ability of the LORAN chain to function in accordance with the contract requirements . . ." (App. at 54a). Therefore, successful completion of the DT&E Field Test was an appropriate event to

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[3] Petitioner encountered substantial problems in advancing the state of the art that caused a two-year delay in contract performance. As a result, costs incurred for the basic chain and for each fixed price option substantially exceeded the respective contract prices. (Board Finding 49, App. at 58a). Petitioner's claim is for unrecovered costs for the delivered option chains. (Board Finding 48, App. at 57a).

mark acceptance of Item 0001 and to start the 120-day period for exercise of the option.

Before the dispute arose, the Contracting Officer's interpretation was the same as Petitioner's; he informed the Administrative Contracting Officer that final acceptance would take place "*at* the completion of DT&E (field) Testing." (App. at 81a, emphasis added).

It is undisputed that the DT&E Field Test was successfully completed on February 3, 1978 and that the Government did not exercise its option within 120 days after that date. (App. at 54a). Therefore, the purported option exercise was untimely and the decision of the Claims Court should have been affirmed.

Here, there were two other acceptance clauses in the contract calling for different acceptance dates. The term "upon" was used in inconsistent ways in the contract. The normal time for acceptance was the date of execution of a DD250 in the absence of an acceptance provision specifying a different time. These circumstances justified calling into play and enforcing the Order of Precedence clause, and the construction against the drafter and strict construction of options principles. The Federal Circuit adopted a time for acceptance not specified in the Schedule or in any of the three acceptance clauses or in any place in the contract; resolved the ambiguity in favor of, instead of against, the drafter of the contract; and construed the options liberally.

In reality, the Federal Circuit rendered an ad hoc decision that is patently incorrect and contradicts its reason for existence—doctrinal stability. The Court reached a result that throws contract administration of inconsistent provisions into chaos and encourages litigation. The Federal Circuit is a great institution with a rich heritage and an important role in our judicial system. Ad hoc decisions like the instant one, however, fall short of the quality required of the Federal Circuit which

has the exclusive appellate jurisdiction of Government contract claims.

REASONS FOR GRANTING THE WRIT

I. The magnitude of Government procurement and the importance of the disputes prevention and resolution procedures require the Federal Circuit to enforce the disputes prevention clauses and provide doctrinal stability.

One of the primary reasons for the creation of the United States Court of Appeals for the Federal Circuit was to provide doctrinal stability in certain areas of law such as patents and Government contract claims. Accordingly, the Circuit was given exclusive appellate jurisdiction in these special areas.

In creating the Circuit Congress stated:

> Since the jurisdiction of the Court of Appeals for the Federal Circuit consists of an unusual number of complex cases in which current law lacks uniformity or is inconsistently applied, and since the new court's decisions are intended to have nationwide precedential effect, the legislation authorizes the judges of the Federal Circuit to determine the size of the panels in which the court will sit . . . . This permits the Federal Circuit to sit in panels of more than three judges, but as less than a full en banc court, for cases in which authoritativeness of decision and doctrinal stability could be enhanced by use of larger panels.

H.R. Rep. No. 1300, 96th Cong., 2d Sess. 18 (1980).

The Government spends about $200 billion annually for procurement. Contract disputes run into billions of dollars. It is, therefore, imperative that the Federal Circuit render quality decisions that enforce the disputes prevention clauses and provide reliable guidance to the Government and its contractors in resolving disputes.

Doctrinal stability is essential for parties to Government contracts to understand their rights and responsibilities. It enables both parties to better evaluate the probable outcome of litigation and therey settle or not initiate claims. The Federal Circuit's decision in the instant case, however, tells the Government contracting community that the probable outcome of a case in the Circuit defies evaluation. The contract terms and three well established and widely relied upon Government contract principles were plainly applicable but not applied. In their place the Court substituted ad hoc views that are wrong and contradict the objectives of eliminating disputes through use of contract clauses and providing doctrinal stability.

Unless the Supreme Court insists upon the continued application of the Order of Precedence clause and the well-settled rules of construction, it will have permitted the Federal Circuit to open the "floodgates" to endless litagation arising from disagreements about inconsistent contract provisions and ambiguous contract language.

II. The Federal Circuit may not properly avoid enforcing the Order of Precedence clause by saying that patently inconsistent clauses can be harmonized.

The Schedule grants the Government option rights and provides in Section 6:

> The Contracting Officer may exercise these options at any time within the period specified in the Schedule by giving written notice to the Contractor.
>
> (b) The time for exercise of the options is set forth in Section E hereof.

Section E of the Schedule provides:

> (T)he Government may exercise this option at any time during contract performance, but not later than 120 days after final acceptance by the Government of Item 0001.

(App. at 3a).

The Inspection and Acceptance clause in the Schedule (Section I) provides for final acceptance of Item 0001 to occur as follows:

> Final inspection and acceptance upon successful completion of DT&E Field Test at destination.

(App. at 18a).

Finally, the Schedule contained an Order of Precedence Clause (Section J—Special Provisions, paragraph 5), which stated:

> In the event of an inconsistency in this contract, unless otherwise provided herein, the inconsistency shall be resolved by giving precedence in the following descending order: 1) Schedule (excluding Statement of Work, the Specifications, and Contract Data Requirements List); 2) General Provisions; 3) the other provisions . . .; 4) Statement of Work. . . .

(App. at 20a).

The function of the phrase "upon successful completion of DT&E Field Test" in the context of Section I is to specify within the Schedule the time for acceptance of Item 0001. This provides within the Schedule the determinable starting time for the 120-day option period. If the term "upon" does not mean "at the time of," then the special acceptance clause has no meaning whatsoever; there is no time specified within the Schedule for acceptance of Item 0001; and there is no period specified within the Schedule for exercise of the option. The plain meaning of the term "upon" in this context is "at the time of." This was the understanding of the Contracting Officer and of the Government inspector before the dispute arose. (App. at 81a). Therefore, the period specified in the Schedule for exercise of the option is not later than 120 days after successful completion of the DT&E Field Test.

The majority's view that the inconsistent acceptance provisions and times (February 3, 1978, March 20, 1978

and March 20, 1979) can be harmonized is unquestionably wrong. As pointed out by the Claims Court:

> The acceptance terms of this contract are inconsistent and one or more must fall.

(App. at 32a). The acceptance clause in the Schedule provides for acceptance "upon successful completion of DT&E Field Test at destination" and that was indisputably February 3, 1978. (App. at 18a). The Statement of Work ¶ 5.2.4 acceptance clause provides "Acceptance will take place following successful completion of DT&E *and correction of design deficiencies.*" (App. at 21a, emphasis added.) Under the Correction of Deficiencies clause Petitioner was required to correct all deficiencies discovered within twelve months after acceptance, which under the Federal Circuit's holding was one year after March 20, 1978. (App. at 30a). One clause that provides for acceptance to occur prior to and another clause providing for acceptance to occur after correction of design deficiencies cannot be harmonized. Paragraph 6 of Task I has the same inconsistency and provides for acceptance after acceptance. (App. at 21a). It is obvious that these different acceptance times and clauses cannot be "harmonized". None of these times or clauses can be harmonized with the March 20, 1978, date of signing the DD 250 which the Federal Circuit found was the acceptance date. The acceptance times are different and therefore inconsistent. The Order of Precedence clause had to be applied to choose the correct date of acceptance.

The majority opinion of the Federal Circuit interpreted "upon" to mean "shortly afterward" which deprived the special acceptance clause in the Schedule of any meaning whatsoever when the Order of Precedence clause made it controlling. That interpretation says that the starting date for the 120-day option period is "shortly after" the event specified as the starting date in the contract. That interpretation also is contrary to the

terms of the Schedule because it provides no determinable starting date within the Schedule.

Judge Bissell's concurring opinion points out that the majority's interpretation of "upon" to mean "shortly afterward" is wrong:

> The majority decision turns on the proposition that "upon" means "shortly afterward," and that we must so interpret it throughout the contract. Examining the Title and Risk of Loss clause belies this position. That clause states that title to supplies "shall pass to the Government *upon* formal acceptance" (emphasis added). In this clause, it is obvious that "upon" means "at the time of acceptance," and not "shortly afterward."

(App. at 13a).

The term "upon" does not mean the same thing throughout the contract and its meaning is determinable only by examining its function and context. The only function of the term "upon successful completion of DT&E Field Test" in the context used in the special acceptance clause in the Schedule is to designate in the Schedule the time when acceptance of Item 0001 will occur, which starts the 120-day option period as provided in Section E of the Schedule.

The Federal Circuit majority decision recognized that the purpose of Section I, the acceptance clause in the Schedule, was to specify the time and place for acceptance, but inexplicably held that acceptance did not take place at either the time or place specified in Section I. The majority states that this clause:

> . . . specifies the time when and the place where the government affirmatively finally will inspect and accept the LORAN 1 chain.

(App. at 5a).

> Although not a model of draftsmanship, the "Inspection at Origin" clause does two things: it specifies the time at which ("upon successful completion of

> DT&E field tests") and the place where ("at destination") final inspection and acceptance shall take place.

(App. at 7a).

These statements are correct. The time for acceptance was "upon successful completion of DT&E Field Test at destination" which was February 3, 1978. The place for acceptance was at the Government sites at which the equipment had been installed. Successful completion of DT&E Field Test took place at Eglin AFB, Florida, where the Monitor Synchronizer Group of the chain was located. The Government representative witnessed and affirmatively signed the inspection document marking the successful completion of the final DT&E Field Test. He did so at one of the places designated in the contract.

The majority substituted "shortly afterward" for "upon" and mistakenly thought that the DD250 was signed at destination. The DD250 was signed at Hanscom AFB, Massachusetts, which was not the destination of the chain. Thus, the majority's holding that the Government accepted the LORAN chain upon signing the DD250 is contrary to both the terms of the acceptance clause and the majority's own interpretation of the clause.

In the eyes of the Government contracting community, the Federal Circuit's decision cripples the Order of Precedence clause and makes every contract inconsistency a potential dispute to be resolved through litigation.

III. The Federal Circuit may not properly disregard the Federal rule of construction against the contract drafter.

There was a split decision at the Board. The Board's decision was reversed by the Claims Court and the concurring opinion states that the basis of the majority opinion is wrong. There are three possible acceptance clauses with each being inconsistent with the other and with

each specifying acceptance times different from the other. The term "upon" is used in inconsistent ways in the contract. The majority decision recognized that the contract was "not a model of draftsmanship," "upon" is susceptible to different meanings, and that the acceptance clause in the Statement of Work is inconsistent with Petitioner's reading of the acceptance clause in the Schedule. (App. at 7a). The majority nevertheless disregarded the widely used construction against the drafter principle relied upon by the Claims Court. Instead, the majority proceeded to interpret "upon" as meaning "shortly afterward" which gives the final acceptance clause in the Schedule absolutely no meaning when the contract expressly provides that it is controlling.

In *United States v. Seckinger*, 397 U.S. at 210, this Court, citing Court of Claims precedents, established the construction against the drafter principle as a federal rule of contract interpretation. This Court stated:

> In fashioning a federal rule we are, of course, guided by the general principles such as that involved here. Among these principles is the general maxim that a contract should be construed most strongly against the drafter, which in this case was the United States.

Where "a contract that has been written by the government . . . is ambiguous, the ambiguity will be resolved against the drafter of the document (the government) . . ." *Sun Shipbuilding & Dry Dock Co. v. United States*, 393 F.2d 807, 816 (Ct. Cl. 1968) cited with approval in *Seckinger*. As Judge Davis pointed out in *Sturm v. United States*, 421 F.2d 723, 727 (Ct. Cl. 1970): "This oft-repeated and much-applied rule (*contra proferentem*) . . . puts the risk of ambiguity, lack of clarity, and absence of proper warning on the drafting party which could have forestalled the controversy; it pushes the drafters toward improving contractual forms; and it saves contractors from hidden traps not of their own making." *See also Gorn Corp. v. United States*, 424 F.2d

588, 592 (Ct. Cl. 1970); *Consolidated Diesel Elec. Co. v. United States*, 533 F.2d 556, 574 (Ct. Cl. 1976); *H & M Moving, Inc. v. United States*, 499 F.2d 660, 671 (Ct. Cl. 1974); *Peter Kiewit Sons' Co. v. United States*, 109 Ct. Cl. 390, 418 (1947).

The Federal Circuit heretofore has applied the rule. For example, in *United States v. Turner Constr. Co.*, 819 F.2d 283, 286 (Fed. Cir. 1987), the Court held "having concluded that Turner's interpretation of the contract was reasonable, we apply the rule of *contra proferentum*, which requires that a contract be construed against the party who drafted the document."

A contractor's reasonable interpretation of a contract drafted by the government ". . . will prevail . . . even though the Government's interpretation may be a more reasonable one since the Government drafted the contract." *United Pac. Ins. Co. v. United States*, 497 F.2d 1402, 1407 (Ct. Cl. 1974). Petitioner's interpretation was reasonable and was precisely the interpretation of the Contracting Officer and the Government's principal inspector before the dispute arose. The Contracting Officer's March 12, 1976 letter to the Administrative Contracting Officer stated:

> Subject contract provides that final acceptance of the entire Ground Chain shall take place *at* the completion of DT&E (field) Testing.

(App. at 81a, emphasis added). The failure of the Federal Circuit to apply the construction against the drafter federal rule requires reversal.

IV. The Federal Circuit may not properly disregard the strict construction of option principle.

As the Claims Court appropriately recognized:

> Inasmuch as the purpose of determining the acceptance date of Chain 1 is to discover the beginning date of the 120-day option period the court is bound

> to construe the terms of the contract strictly. Indeed, the general attitude of the courts and the ASBCA is to strictly construe contractual option provisions because the options subject contractors to potentially major risks which should not be extended beyond the limits the contractor had agreed to accept.

(App. at 31a).

It was well-settled that option contracts "are strictly interpreted in favor of the party bound and against the party that is not bound." 4 *Williston on Contracts* § 620 at 753 (3d ed. 1961); *see, e.g., Cummings v. Bullock*, 367 F.2d 182, 186 (9th Cir. 1966), where the court, in a lease option to purchase agreement, applied both the strict construction of options and construction against the drafter rules.

The Federal Procurement Regulations reflect the policy in favor of strictly limiting the period in which an option may be exercised. *See* ASPR §§ 1-1502-1 to 1-1504 (1974); DAR §§ 1-1501 to 1-1503 (1983). As pointed out by the Board in *Lear Siegler, Inc.*, ASBCA No. 12164, 69-1 BCA ¶ 7563 at 35,020:

> ASPR 1, Part 15, "Options," provides clear Departmental policy guidance to the effect that an option contract shall fix the period within which the option may be exercised, and that the fixed period shall in all cases be kept to a minimum, for the stated reason that options require offerors to guarantee prices for definite periods of time with no assurance that orders will be placed.

In *General Dynamics Corp.*, ASBCA No. 20882, 77-1 BCA ¶ 12,504, the Board held that a purportedly timely option exercise which varied the delivery schedule was invalid and a subsequent purported option exercise which corrected the schedule was invalid because it was one day late. *See also J.E.T.S., Inc.*, ASBCA No. 26135, 82-2 BCA ¶ 15,986 at 79,274 ("Exercise of an option must be strictly construed."), and *Space Age Eng'g, Inc.*, ASBCA

No. 22901, 78-2 BCA ¶ 13,543 (option terms strictly construed and that the Government's attempted option exercise was a day late and invalid).

The federal law was well settled that options are to be strictly, not expansively, construed. Although relied upon by the Claims Court, the Federal Circuit majority opinion does not even mention this principle. The concurring opinion attempts to distinguish this principle on the ground that the trigger to the 120-day option period is not a part of the option agreement.

The failure of the Federal Circuit to apply the strict construction of options and construction against the drafter rules and the Order of Precedence clause appears to have been based on the notion that acceptance could not "automatically" take place upon the happening of an event. Such a notion is contrary to the terms of the contract, the understanding of the Contracting Officer and the Government's inspector before the dispute arose, the regulations, as well as the cases. The concurring opinion recognized that the parties could agree on the happening of an event as the time of acceptance.

The contract terms plainly specify an event and do not require a DD250 for acceptance. (All of the acceptances provisions in the contract provide for acceptance to occur upon the happening of an event.) In performance contracts, tests are the primary means of inspection. The successful completion of the DT&E Field Test on February 3, 1978 represented the successful completion of 150 performance requirements tests and provided the critical information needed for option exercise. The Board found that: "The successful completion of these tests demonstrated the ability of the LORAN chain to function in accordance with the contract requirements." (App. at 54a). It therefore made sense to start the 120-day option period at the time the Government's inspector signed the final test (inspection) marking the successful completion of all the performance requirements. Acceptance

of Item 0001 triggered the 120-day option period, but did not excuse Petitioner from complying with any unperformed terms of the contract.

Petitioner's interpretation of the time of acceptance of Item 0001 was made known to the Contracting Officer prior and subsequent to February 3, 1978. Before the dispute arose, the Contracting Officer and the Government inspector understood that "upon" in the applicable acceptance clause meant at successful completion of the DT&E Field Test. (App. at 81a).[4]

The regulations relied upon by the majority expressly recognize that the time of acceptance depends on the contract provisions. ASPR § 14-306 (1974) provides:

> Acceptance of Supplies or Services. . . . (b) *Depending upon the provisions of the contract*, acceptance may be effected prior to, at the time of, or after delivery.

(Emphasis added).

Here, the provisions of the contract covering Item 0001 expressly called for acceptance earlier than delivery and acceptance at a time different from the date of signing the DD250. There is no basis in the regulations to disregard a contract provision specifying a time for acceptance different from the date of signing the DD250.

The cases establish that final Government acceptance can take place upon the successful completion of inspections without the execution of a DD250. *See Trio-Tech, Inc.*, VACAB No. 598, 68-1 BCA ¶ 6828 at 31,557 n.3 (acceptance was effected by final inspection and payment, even though there was no "evidence of a formal written acceptance," because the contract provided that

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[4] The majority decision's reference to the parties' interpretation during performance of the contract is to statements made after the dispute arose and are in the context of complying with the Government's demands in order to receive payment on Item 0001. (App. at 37a.)

"[a]cceptance will be the date the Veterans Administration receives satisfactory inspection or test report.") and cases cited by Claims Court.

Instead of providing doctrinal stability, the Federal Circuit's decision in the instant case created turmoil in areas that had been well-settled.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1475

SPERRY CORPORATION,
Plaintiff-Appellee,

v.

THE UNITED STATES,
Defendant-Appellant.

Appealed from U.S. Claims Court
Judge Tidwell

Decided April 21, 1988

Clarence T. Kipps, Miller and Chevalier, of Washington, D.C., argued for plaintiff-appellee. With him on the brief were *John Lloyd Rice* and *John J. O'Connor, III*. Also on the brief were *Bernard Fried* and *Norman A. Steiger*, Unisys Corporation, of counsel.

E. Kathleen Shahan, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for defendant-appellant. With her on the brief were *Richard K. Willard*, Assistant Attorney General and *David M. Cohen*, Director. Also on the brief was *Lt. Col. William M. Henabray*, Department of the Air Force, of counsel.

Before FRIEDMAN, NEWMAN, and BISSELL, *Circuit Judges.*

FRIEDMAN, *Circuit Judge.*

The sole question in this case, here on the government's appeal from the United States Claims Court, is whether the government's exercise of an option to purchase additional items under a procurement contract was timely. The contract required the government to exercise the option within 120 days of the government's acceptance of the product that was the subject of the contract, and the issue is the date of acceptance. The Claims Court, reversing the decision of the Armed Services Board of Contract Appeals, held that the government's exercise of the option was untimely. *Sperry Corp. v. United States*, 9 Cl. Ct. 488 (1986). We reverse, concluding that the exercise was timely.

I

A. In January 1974, the government executed a contract with the appellee, Sperry Corporation, that required Sperry to design, fabricate, test and deliver one LORAN-D ground chain (Item 0001). This item was an advanced transportable, computer controlled, solid state long-range navigation (LORAN) system. The equipment transmits signals that can be received aboard aircraft, ships, or manpacks. The receiver determines locations by interpreting the time differences between precisely controlled pulses from the transmitters.

The contract called for a significant amount of testing by Sperry, lasting throughout the contract period. The tests were designed by Sperry and approved by the government, which participated in, or observed most, if not all, of the tests. Participation in the tests by Air Force personnel was intended to enable them to learn to operate the system and to verify that the equipment met the contractual requirements.

Development, Test and Evaluation (DT&E) is a process by which each item, including the whole system assembled from previously proven items, is tested to assure that the items and the system meet the requirements of the contract. The Physical Configuration Audit is designed to compare the equipment tests with the prescribed technical data and to correct any deficiencies. The Formal Qualification Review (Qualification Review) is intended to gather data from the different tests and review them as a whole. The Functional Configuration Audit examines the test results to determine whether the testing was conducted properly.

The final delivery date under the contract (as modified) was May 15, 1978. DT&E field tests were completed February 3, 1978. The field portion of the Physical Configuration Audit was completed February 9, 1978. The Functional Configuration Audit was completed February 28, 1978, and the Formal Qualification Review was completed by March 1, 1978. Between February 3 and March 18, 1978, Sperry refurbished the site on which the tests were completed and the equipment. The government made its final inspection from February 27 to March 18, 1978, and on March 20, 1978, it executed a DD Form 250 accepting the chain.

B. The contract "granted to the government the option to purchase up to three additional LORAN-D Ground Chains (Chains 2, 3, and 4) at prices specified in the contract. The option had to be exercised 'within 120 days after final acceptance by the Government of Item 0001 [chain one] . . . .'" *Sperry Rand Corp.*, 83-2 B.C.A. (CCH) ¶ 16,841 at 83,787 (ASBCA Sept. 27, 1983). Contending that it had finally accepted the LORAN-D on March 20, 1978, when it executed the DD Form 250, the government exercised the option for two additional chains on July 6, 1978, within 120 days of the date of that acceptance.

Sperry responded that the government finally had accepted the LORAN-D upon completion of the DT&E field tests on February 3, 1978, so that the government had failed to exercise the option within 120 days. Sperry interpreted the government's exercise of the option as a constructive change in the contract entitling it to an equitable adjustment in the contract price. Sperry supplied chains 2 and 3 under protest.

Sperry filed a claim with the contracting officer for an equitable adjustment. The contracting officer denied the claim. In a lengthy opinion the Armed Services Board of Contract Appeals (Board) (with one of the five members dissenting) denied the appeal.

Sperry sought review in the Claims Court pursuant to the Wunderlich Act, 41 U.S.C. § 321 (1982). The Claims Court reversed the decision of the Board and remanded for a determination of damages. The Claims Court subsequently entered final judgment against the United States in the amount stipulated by the parties.

Because the numerous contractual provisions involved are complicated and best understood in the context of the facts of the case, we describe those provisions in connection with our discussion of the legal issues in part II.

II

The linchpin of the Claims Court decision that the government did not timely exercise its option and Sperry's defense of that ruling is the following provision contained in a section of the contract called the Schedule:

> 0001 Inspection at origin. Final inspection and acceptance upon successful completion of DT&E Field Test at destination.

Sperry contends that under this provision "[f]inal . . . acceptance" of the contract by the government occurred automatically upon the successful completion of

the DT&E field testing in February 3, and that this date was the beginning of the government's 120-day period for exercising the option. Sperry then refers to Special Provision 5 of Section J of the contract, ORDER OF PRECEDENCE, which states:

> In the even of an inconsistency in this contract, unless otherwise provided herein, the inconsistency shall be resolved by giving precedence in the following descending order: 1) Schedule (excluding Statement of Work, the Specifications, and Contract Data Requirements List); 2) General Provisions; 3) the other provisions of the contract whether incorporated by reference or otherwise; 4) Statement of Work; 5) Contract Data Requirements List; 6) the Specifications . . .; 7) The Contractor's Technical Proposal as described in Section F.

According to Sperry, the "Order of Precedence" clause makes the "Inspection at Origin" clause, as Sperry interprets that clause, controlling in resolving any inconsistencies between the "Inspection at Origin" clause and the other provisions of the contract upon which the Board relied in its decision.

We conclude, however, that the "Inspection at Origin" clause does not have the effect that Sperry ascribes to it. Instead, it merely specifies the time when and the place where the government affirmatively finally will inspect and accept the LORAN 1 chain. Moreover, under our view of that clause, there is no "inconsistency in this contract" that requires resort to the "Order of Precedence" clause. The Board correctly concluded that

> it is possible to harmonize all contract provisions relating to inspection, testing, delivery and acceptance without creating conflicts between them or rendering some of the provisions meaningless. In the absence of conflict, the "Order of Precedence" clause need not be called upon to establish the alleged primacy

> of the schedule "Inspection and Acceptance" provision [Section I] over general provisions and specifications as suggested by appellant [Sperry] and in the dissenting opinion.

Sperry Rand Corp., 83-2 B.C.A. (CCH) ¶ 16,841 at 83,799 (ASBCA Sept. 27, 1983) (citations omitted).

Various clauses in the contract, read in combination, show that the government finally accepted the LORAN 1 chain on March 20, 1978, when it signed the DD Form 250. This conclusion accords with the parties' interpretation of those provisions during the performance of the contract. The result of our holding that the government finally accepted the LORAN 1 chain on March 20, 1978, is that the government's exercise of the options was timely because it took place within 120 days of that acceptance.

A. The contract incorporated the Armed Services Procurement Regulations (ASPR) (which have been succeeded by the current Federal Acquisition Regulations), including ASPR 14-1001.6 and ASPR 14-306, which stated:

> 14-1001.6
>
> Acceptance means the act of an authorized representative of the Government by which the Government assumes for itself, or as agent of another, ownership of existing and identified supplies tendered or approves specific services rendered, as partial or complete performance of the contract on the part of the contractor.
>
> 14-306
>
> (b) Depending upon the provisions of the contract, acceptance may be effected prior to, at the time of, or after delivery. Acceptance shall ordinarily be evidenced by execution of an acceptance certificate

> on the applicable inspection and receiving report form (DD Form 250, DD Form 115, or Standard Form 44) . . . .

Read in the light of this and other provisions of the contract, the "Inspection at Origin" clause does not provide that completion of DT&E testing itself constituted final acceptance by the government. Nor does that clause indicate that the parties intended in this contract to depart from the usual procedure that government acceptance would "be evidenced by execution of an acceptance certificate on the applicable inspection and receiving report form [here DD Form 250]."

Although not a model of draftsmanship, the "Inspection at Origin" clause does two things: it specifies the time at which ("upon successful completion of DT&E field tests") and the place where ("at destination") final inspection and acceptance shall take place. The clause, like some contract clauses, contains no verb, but inherent in the provision are the words "shall take place" following "final inspection and acceptance." The word "upon" generally is susceptible to different interpretations but in this context we think it means "shortly afterward."

The identical language is used in section F of the contract, which states in pertinent part:

> Upon successful completion of the DT&E field test, the contractor shall restore the sites to the condition they were in prior to the test.

Since this provision requires Sperry to take affirmative action to restore the test site to its former condition, the word "upon" necessarily means "shortly afterward." The identical word in the identical language of the "Inspection at Origin" clause should be given the same meaning unless there were clear indication that the parties intended it to have a different meaning. *See Peerless Casualty Co. v. Mountain States Mutual Casualty Co.*, 283

F.2d 268, 276-77 (9th Cir. 1960). There is no indication that the parties so intended. Indeed, if the "Inspection at Origin" clause had been intended to have the meaning that Sperry and the Claims Court would give it, one would have thought it would have stated: "The successful completion of DT&E Field Tests shall constitute final inspection and acceptance."

Other provisions of the contract indicate that final inspection by the government required some affirmative action and did not occur automatically upon successful completion of the DT&E field test. Subparagraph (a) of the General Provisions of the contract under the category "INSPECTION" states: "All supplies (which term throughout this clause includes without limitation . . . end products) shall be subject to inspection and test by the Government, to the extent practicable at all times and places including the period of manufacture, and in any event prior to acceptance."

Subparagraph (a) in the General Provisions under the category "TITLE AND RISK OF LOSS" states: "Unless this contract specifically provides for earlier passage of title, title to supplies covered by this contract shall pass to the Government upon formal acceptance, regardless of when or where the Government takes physical possession."

These two paragraphs require that there will be "inspection and test by the Government . . . prior to acceptance" and that there will be a "formal acceptance" by the government.

Finally, in the "Statement of Work" category, paragraph 5.2.4 provides:

> Acceptance will take place following successful completion of DT&E and correction of design deficiencies.

This latter provision, which specifically deals with the subject of "acceptance," shows that the parties contem-

plated and intended that acceptance would take place "following" successful DT&E testing. This provision necessarily rested on the assumption that the government would take affirmative action to accept. It is inconsistent with Sperry's view that acceptance took place immediately and automatically upon successful completion of the DT&E field tests. As the Board stated:

> These acceptance tests were the conduct constituting "final inspection" within the meaning of Section I of the contract schedule. As such, inspection was completed only when the acceptance tests had been performed. The SPD confirmed delivery and acceptance at the destination by his signature on the DD250 (Finding 39)....
>
> ....
>
> However, it is important to note that acceptance not only follows delivery, but also is not contemplated to occur until all required inspection) including testing) has been completed. This is not only mandated by the "Inspection" clause, but also by Section I of the contract schedule that requires "[f]inal *inspection and acceptance* upon successful completion of DT&E Field Test at destination."

Id. at 83,797 (emphasis in original).

In sum, we agree with the Board that the government's "final acceptance" did not occur until the government executed the DD Form 250 on March 20, 1978. As the Board stated, "[t]his was the 'conclusive and decisive action by the Government upon which it determines through its authorized agents that, on the basis of all the facts within its knowledge, the contractor has satisfactorily performed his obligations under the contract.'" 83-2 B.C.A. (CCH) ¶ 16,841 or 83,799 (citation omitted). The Board determined that "the contract established a well-defined procedure from inspection to acceptance and

we can find no indication that the parties intended to discard these contractual steps." *Id.* at 83,796-97.

B. Alternatively, Sperry argues, as the Claims Court held, that the government's acceptance took place on March 1, 1978, which still would make the government's exercise of the option untimely. According to the Claims Court and Sperry, all of the testing was completed by that date and the government's acceptance took place at that time. The Claims Court held, and Sperry argues, that refurbishment of the chain was not necessary to acceptance, and the government "received from plaintiff exactly what the contract called for, *i.e.*, refurbishment of the chain after sucessful completion of the DT & E Field Test." *Sperry Corp. v. United States*, 9 Cl. 488, 498 (1986). As the Claims Court viewed the situation, "Chain 1 was accepted on March 1, 1978 even though plaintiff [Sperry] was obligated by the terms of the contract to continue unfinished tasks." *Id.* at 498 (footnote omitted).

We agree with the Board's reasoning in rejecting that contention:

> There is nothing to indicate that the parties contemplated acceptance of the entire system when equipment was only partially refurbished or refurbishment had been completed at some of the sites. . . . The fact that the parties recognized that refurbishment of the equipment at all sites would have to be accomplished before acceptance is shown by the requirement to have the equipment in "deliverable condition" as a result of refurbishment. Delivery of the system had to occur before acceptance, and thus refurbishment also had to be completed at that point.

Sperry Rand Corp., 83-2 B.C.A. ¶ 16,841 at 83,798.

Moreover, this contention is subject to the same fatal infirmity as the argument that the government's accept-

ance occurred on February 3, 1978, namely, that under the "Inspection at Origin" clause, the government's acceptance occurred automatically when the DT&E field tests successfully were completed and did not require any further affirmative action by the government. The same reasoning that led us to reject the contention that the government accepted on February 3, 1978, also requires rejection of the claim that in any event acceptance took place on March 1, 1978.

C. Finally, our interpretation of the contract accords with the views expressed by the parties during performance of the contract that acceptance would require some affirmative action by the government and would take place only when the government executed a DD Form 250. That fact is a relevant consideration in interpreting the contract. *General Warehouse Two, Inc. v. United States*, 389 F.2d 1016, 1020 (Ct. Cl. 1967) and cases cited.

In Sperry's Production Progress Report of November 1977, Sperry stated that "the balance of program tasks including . . . system acceptance and delivery is scheduled to be completed by 15 May 1978." In the January 1978 Production Progress Report, Sperry stated that "[r]eliability demonstration tests have been completed. The balance of program tasks including antenna teardown, design reviews, refurbishment, system acceptance and delivery is scheduled to be completed by 10 March 1978." In a meeting with the government on February 2, 1978, Sperry's program manager requested the government to execute a DD Form 250 upon completion of the "on-site" portion of the physical configuration audit, which was scheduled to occur on February 15, 1978. The government declined to do so.

An inter-office memorandum prepared by Sperry personnel on February 24, 1978, stated that acceptance had not yet occurred. A letter from the contracting officer to

Sperry on February 27, 1978, discussed acceptance as a future event. An Engineering Development report issued by Sperry for the period February 1-28, 1978, contained a note stating: "The only remaining program tasks are completion of refurbishment and acceptance of transmitter sites and completion of CDRL data items." The government Production Progress Report for February 1978 stated: "Loran Chain—All program tasks have been completed except for refurbishment and acceptance of transmitter sites which is scheduled to be completed by mid-March." A Program Progress Report prepared by Sperry March 13, 1978, stated substantially the same thing.

Finally, in a letter to the government dated April 20, 1978, Sperry stated that "the Loran C/D Ground Chain was formally accepted by the Air Force on March 20, 1978"—the date the DD Form 250 was signed. Although conduct after the dispute arises is not necessarily indicative of the intent of the parties, (*Dynamics Corp. v. United States*, 389 F.2d 424 (Ct. Cl. 1968)), this particular statement is consistent with and confirms Sperry's earlier recognition that affirmative action by the government would be necessary for acceptance.

CONCLUSION

The judgment of the United States Claims Court awarding Sperry damages against the United States is

REVERSED.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1475

SPERRY CORPORATION,
Plaintiff-Appellee,

v.

THE UNITED STATES,
Defendant-Appellant.

BISSELL, *Circuit Judge*, concurring in result.

The majority decision turns on the proposition that "upon" means "shortly afterward," and that we must so interpret it throughout the contract. Examining the Title and Risk of Loss clause belies this position. That clause states that title to supplies "shall pass to the Government *upon* formal acceptance" (emphasis added). In this clause, it is obvious that "upon" means "at the time of acceptance," and not "shortly afterward."

In my view, a better basis for decision begins with the recognition that the government is widely known to accept contract performance through the execution of the DD250. As the majority acknowledges, ASPR 14-306(b) states that "[a]cceptance shall ordinarily be evidenced by execution" of a DD250. The Title and Risk of Loss clause just noted reveals why such a bright line event is particularly important: the government owns the goods and bears the risk of loss for them once it has accepted them. In light of the normal practice of government acceptance through execution of the DD250, and the policy reasons underlying such a bright line event, I would hold

that acceptance occurs only through the execution of the DD250, or similar document, unless the contract *clearly* states otherwise. Although the parties may agree to acceptance by some other means, the subject contract is too loosely worded to hold that Sperry and the government did so here.

I must add that this conclusion does not reflect insensitivity to Sperry's right, as optionor, to protect itself against attempts by the government to enlarge a fixed option period. This case, however, is not about strictly construing the terms of an option agreement. It is about the separate question of how to interpret what this contract means by the term "final acceptance."

APPENDIX B

IN THE UNITED STATES CLAIMS COURT

(FILED: February 5, 1986)

No. 116-84C

SPERRY CORPORATION,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

Contract; Wunderlich Act Review; Option Period/Strict Interpretation; Order of Precedence Clause; Disparate Contract Terms; Acceptance of Item; DD250 Standard Form.

[Filed Feb. 5, 1986]

Clarence T. Kipps, Jr., Washington, D.C., for plaintiff. *John L. Rice, John J. O'Connor, III, and Norman A. Steiger*, of counsel.

Kathleen A. Flynn, Washington, D.C., with whom was *Acting Assistant Attorney General Richard K. Willard*, for defendant. *Major Gerald J. Brentnall*, of counsel.

OPINION

TIDWELL, *Judge*:

This action is before the court on cross-motions for summary judgment. At issue is a decision by the Armed Services Board of Contract Appeals (ASBCA or the Board) brought under the Wunderlich Act, 41 U.S.C. §§ 321 and 322 (1982), which denied the contractor's claim, plaintiff here, for equitable adjustment for alleged constructive changes in the government's application of certain test procedures and decisions having to do with the purchase of two additional option items. This court will cite facts as necessary to support its conclusions but not all of the facts as found by the Board which are artfully set out in its decision, *Sperry Rand Corp.*, 83-2 BCA ¶ 16,841. On the basis of the administrative record, the parties' briefing and oral argument, the court concludes that as a matter of law the Board's decision is erroneous.

FACTS

This case involves negotiated fixed-price incentive contract No. F19628-74-C-0098 executed on January 25, 1974 by plaintiff Sperry and defendant the United States, acting through the United States Air Force which required plaintiff to design, fabricate, test and deliver one LORAN-D Ground Chain (Chain 1), an advanced state-of-the-art aid to navigation systems.[1] The contract called for a significant amount of testing by plaintiff, lasting throughout the course of the contract, plus a significant amount of paperwork analysis and review, with "hands-on" effort by Air Force personnel to verify that the equipment offered met the contractual requirements and to

[1] Chain 1 is actually item 0001 of the contract. Sperry was obligated to build, test and refurbish Chain 1. Chains 2, 3 and 4 were respectively items 0002, 0003 and 0004 of the same contract.

learn to operate the equipment.[2] The tests were designed by plaintiff and approved by defendant who participated in or observed most, if not all, of the tests.

The contract also contained option provisions permitting defendant to purchase up to three additional ground chains, at set prices if purchased within a time frame set out in the contract. Defendant gave notice on July 14, 1978, that it wished to exercise its option for chains 2 and 3. Plaintiff responded by stating that by the terms of the contract defendant had 120 days from the date of acceptance of Chain 1 within which to exercise its option and that in plaintiff's opinion the 120-day option period had passed.[3] Because of defendant's need for the chains plaintiff agreed to supply chains 2 and 3 under protest and seek an equitable adjustment at a later date to cover their increased costs and time of performance. Plaintiff subsequently delivered chains 2 and 3 to defendant as well as a claim for equitable adjustment. Defendant does not agree with plaintiff that the 120-day option period had expired prior to its ordering of Chains 2 and 3 because, according to defendant, Chain 1 was not accepted until March 20, 1978, within the 120-day option period. The contracting officer denied plaintiff's claim on that basis and the ASBCA upheld the decision of the contracting officer. Plaintiff thereupon filed an appeal with this court pursuant to the Wunderlich Act, *supra*.

The Board found that the contract gave defendant the authority to exercise the options at the pre-arranged price, for Chains 2 and 3 at any time during perform-

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[2] Practically every item, configuration, etc., was covered within the contract by tests. The tests were called for as Contract Sub-Line Item No. A0006AA, Category I Test Plan/Procedures, Subsystem Test. There were approximately 150 tests.

[3] Plaintiff alleged that Chain 1 was accepted on February 3, 1978. There are 161 days between February 3 and July 14, 1978. For reasons that will soon become obvious, there were 135 days between March 1 and July 14, 1978.

ance of the contract but no later than 120 days after final acceptance of Chain 1 and that Chain 1 was accepted on March 20, 1978. The option was exercised on July 14, 1978, within the 120-day option period. From this issue confusion abounds. The following contractual terms and conditions bear upon the issue and are very possibly the chief cause of the mischief:

From the Schedule

SECTION E—SUPPLIES/SERVICES & PRICES

1. The Contractor shall design, fabricate, test and deliver the equipment, data, and services below in accordance with the documents set forth in Section F:

0001 LORAN Ground Chain, Tactical, Transportable, 1 each (Basic with Technical Alternate 2 Configuration)

* * * *

SECTION I—INSPECTION AND ACCEPTANCE [4]

Items

0001 Inspection at origin. Final inspection and acceptance upon successful completion of DT&E Field Test at destination.

SECTION F—DESCRIPTION/SPECIFICATIONS

Through Section F of the Schedule the following language was added to Task 1 of the SOW (Statement of Work).

Location of DT&E. Field testing of the first chain is to be accomplished in S.E.U.S. (Southeastern United States) such that the location of the monitor and primary service area would be the Eglin AFB, FL area. The three transmitter sites would have to be located in S.E. U.S. such that they provide 400

[4] As amended by P00007, July 8, 1975.

mile base legs, with the open side of the TRIAD facing the Gulf of Mexico. Test sites to be selected for the DT&E testing in S.E. section of the U.S. shall be on Government-owned property.

Refurbishment and Restoration After DT&E. Upon successful completion of the DT&E field test (sic), the contractor shall restore the sites to the condition they were in prior to the test. Also, the contractor shall refurbish and restore, including replacement if necessary, all elements of the chain to a deliverable condition including any material and fixtures and other aspects which may have been damaged in disassembling the chain.

Design Deficiencies. During or subsequent to DT&E the contractor shall correct any design deficiencies.

From the General Provisions

TITLE AND RISK OF LOSS (1968 JUN)

(a) Unless this contract specifically provides for earlier passage of title, title to supplies covered by this contract shall pass to the Government upon formal acceptance, regardless of when or where the Government takes physical possession.

* * * *

MATERIAL INSPECTION AND RECEIVING REPORT (1969 DEC)[5]

At the time of each delivery of supplies or services under this contract, the Contractor shall prepare and furnish to the Government a Material Inspection and Receiving Report in the Manner and to the ex-

[5] The Armed Services Procurement Regulation Appendix cited in this clause requires plaintiff to proffer a document (Standard Form DD250) of which more will be said, to defendant for acceptance or rejection of any item, or for the chain in its entirety.

tent required by ASPR Appendix I, "Material Inspection and Receiving Report."

From the Special (or Other) Provisions

5. ORDER OF PRECEDENCE.

In the event of an inconsistency in this contract, unless otherwise provided herein, the inconsistency shall be resolved by giving precedence in the following descending order: 1) Schedule (excluding Statement of Work, the Specifications, and Contract Data Requirements List); 2) General Provisions; 3) the other provisions of the contract whether incorporated by reference or otherwise; 4) Statement of Work; 5) Contract Data Requirements List; 6) the Specifications . . .; 7) The Contractor's Technical Proposal as described in Section F.

From the Statement of Work

5.0 *Delivery*

5.1 Deliver dates and quantities for Development Items shall be as specified in the schedule of the contract of which this SOW is a part. Acceptance by the Government of the LORAN D Ground Chain Equipment shall be accomplished at the Configuration Item level.

5.2 Configuration Items will not be accepted until the following conditions are met.

5.2.1 The Contracting Officer has acknowledged completion of Preliminary Design Review, Critical Design Review, Functional Configuration Audits, Physical Configuration Audit, Formal Qualification Review.

5.2.2 One or more of each Configuration Item has been qualified and tested in accordance with Government approved test plan, procedures and meet the specification requirements.

5.2.3 The Configuration Items have satisfactorily passed acceptance test in accordance with Acceptance Test Plans, Procedures, and Specifications which have been previously approved by the Contracting Officer.

5.2.4 Acceptance will take place following successful completion of DT&E and correction of design deficiencies.

7.0 *Contractor Tasks*

* * * *

7.2 *Development Test and Evaluation* The contractor shall perform development tests and evaluations as specified in Task 1 of SOW and [the] development specifications.

* * * *

7.3.2.2 *Configuration Management* The contractor shall accomplish this effort in accordance with Task 17 of this SOW.

TASK I

TEST

6. *Acceptance* Final acceptance of all contractor provided equipment services, and materials shall be accomplished upon both the successful completion of System Tests and the clearing of all test and design discrepancies from all test phases.

7. *Configuration Audits* Functional Configuration Audits and Functional Qualification Reviews shall be conducted in accordance with Task 17 of this statement of work.

* * * *

TASK 17

CONFIGURATION MANAGEMENT

* * * *

4. *Configuration Audits*:

a. *Functional Configuration Audit.* The contractor and the procuring activity shall conduct a Functional Configuration Audit on the first unit of each configuration item. . . . The contractor is responsible for the conduct of the audits. . . .

b. *Physical Configuration Audit.*[6] The contractor and the procuring activity shall conduct an incremental Physical Configuration Audit on the first production unit of each configuration item. . . . Physical Configuration Audit on all Configuration Items shall be completed not later than "end of DT&E." . . . The contractor is responsible for the conduct of the audit . . . .

c. *Formal Qualification Review.* The contractor and the procuring activity shall conduct a Formal Qualification Review on a unit of each configuration item after successful completion of System Testing. . . . The contractor is responsible for the conduct of the audit. . . .

This concludes the court's listing of pertinent contract terms.

"DT&E," mentioned above, stands for Development, Test and Evaluation. It is a process by which each item, including the whole system assembled from previously proven items is tested to assure the items and the system meet the requirements of the contract. The DT&E plans were prepared by plaintiff and approved by defendant. Plaintiff was primarily responsible for the testing, but defendant's representatives were present throughout the process. The Board found that the Physical Configuration Audit (PCA), Functional Configuration Audit (FCA) and Formal Qualification Review (FQR) were

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[6] As amended by P00021, June 2, 1976.

included within DT&E. PCA is designed to compare the equipment tests with the technical data described in Chain 1 and to correct any deficiencies.[7] FQR is intended to gather data from the different tests and review them as a whole. FCA supports FQR by examining the same test results, but is designed specifically to see whether the testing was conducted properly. Amendment P00021 changed the Statement of Work by requiring PCA on the first production unit of each component prior to completion of DT&E. The Board found that "every component" in Chain 1 was a configuration item.

The Board found that the DT&E Field Tests were successfully completed on February 3, 1978 and from that date until March 18, 1978 plaintiff performed refurbishment work on the equipment at the sites in preparation for the government's Initial Operating Test and Evaluation (IOT&E).[8] The Board also found that the field portion of the PCA was completed on February 9, 1978 but that PCA was not formally completed until sometime in April, 1978. FCA was completed on February 28, 1978 and FQR on March 1, 1978. Defendant's inspection was completed March 18, 1978 and on March 20, 1978 the parties executed a DD250 in accordance

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[7] After finding that PCA was a part of DT&E, the Board, and the parties as well, proceeded to ignore its place in the acceptance process. For example, the Board found that FCA and FQR were completed prior to March 1, 1978, without noting the PCA completion date. The Board also found that plaintiff's witnesses, "advanced the position that acceptance occurred simultaneously with the conclusion of the last DT&E test. The Government's witnesses contended that the option could not begin to run until all tests and all data procedures (FCA and FQR) had been completed." (Transcript citations omitted.)

[8] It was intended by defendant under IOT&E to have it's personnel operate Chain 1, with support from plaintiff's personnel. The IOT&E started on March 21, 1978 and lasted for 61 days, until May 21, 1978. It is interesting to note that there were 81 days between March 1 and May 21, 1978, and 102 days between February 3 and May 21, 1978. Both within the 120-day option period.

with the "Material Inspection and Receiving Report" clause for Chain 1. The Board thereafter concluded that the option period began to run on March 20, 1978, the date of the DD250 and that since the option was accepted on July 14, 1978, 116 days later, the option was valid and plaintiff was required to provide Chains 2 and 3 at the contract price.

In the opinion of the court the only issues in this case of any merit are legal in nature and can be determined by an analysis and interpretation of several of the specifications of the contract which might to be in conflict with each other. The principle issue is: Did defendant exercise its option rights for Chains 2 and 3 within the 120-day time period? [9]

DISCUSSION

The terms of the contract, and the Wunderlich Act [10] do not prohibit the ASBCA from making conclusions of

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[9] The Board listed three issues described thusly:

1. What was the impact of the implementation of the new billing schedule contained in the DD250 executed on 29 March 1977?

2. What impact did completion of the last DT&E filed test, (sic) on 3 February 1978, have on commencement of the period within which the Government could exercise its option to purchase additional LORAN chains?

3. If the option period did not begin on 3 February 1978, on what date did it commence and what event marked that milestone?

[10] The Wunderlich Act, 41 U.S.C. §§ 321 and 322 (1982) provide:

§ 321. *Limitation on pleading contract-provisions relating to finality; standards of review*

No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duty authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or

fact and law in order to render its decisions. In truth, the Wunderlich Act gives the decision of a Board finality unless the decision is fraudulent, capricious, arbitrary, so grossly erroneous as to necessarily imply bad faith, or is not supported by evidence. 41 U.S.C. § 321 (1965). This court in reviewing the factual findings of the Board must accept the findings as final and conclusive even if the court would not have reached the same findings or conclusions. *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966); *Tagg Brothers & Moorhead v. United States*, 280 U.S. 420 (1930); *Marley v. United States*, 191 Ct. Cl. 205, 423 F.2d 324 (1970); *Southwest Welding & Manufacturing Co. v. United States*, 188 Ct. Cl. 925, 413 F.2d 1167 (1969). This is a very difficult standard to meet; however it would be incorrect to conclude that the court is powerless to redress a wrong or that an appeal to the court is a useless act. The interpretations of law made by the Board and applied to the facts are not accorded the finality by the Wunderlich Act that the Board's factual determinations receive. *BCM Corp. v. United States*, 2 Cl. Ct. 602 (1983); *Dynamics Corp. of America v. United States*, 182 Ct. Cl. 62, 389 F.2d 424 (1968). *In Donald M. Drake Co. v. United States*, 194 Ct. Cl. 549, 439 F.2d 169 (1971), the court stated that board decisions on "questions of law are open to independent judicial consideration." *Id.* at 552, 439 F.2d at 171. Because the

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to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

§ 322. *Contract-provisions making decisions final on questions of law*

No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

interpretation of specifications is a legal matter finality thereupon is reserved to the courts. The court may agree with the legal interpretations made by a Board of Contract Appeals because such interpretations are a necessary adjunct to the Board's ability to reach its decision. *C.J. Langenfelder & Sons, Inc. v. United States*, 169 Ct. Cl. 465, 341 F.2d 600 (1965). The Board's legal interpretations, including the interpretation given specifications, must be examined, but with respect and dignity, given the overall degree of expertise of the ASBCA in this area of the law. *George Hyman Construction Co. v. United States*, 215 Ct. Cl. 70, 564 F.2d 939 (1977). Oftentimes the expertise of a Board in such matters can be helpful to the court. *Icono v. United States*, 6 Cl. Ct. 149 (1984), *aff'd*, 770 F.2d 179 (Fed. Cir. 1985). *See also, Hegeman-Harris & Co. v. United States*, 194 Ct. Cl. 574, 440 F.2d 1009 (1971). *Copco Steel & Engineering Co. v. United States*, 169 Ct. Cl. 601, 341 F.2d 590 (1965), which is factually similar to the case at bar, held that the search for the acceptance date of items under a government contract must of necessity begin with a search for the date from which the clock began to run on the option item(s); a question of law for decision by the court. *Dynamics Corp. of America v. United States*, 182 Ct. Cl. 62, 72, 389 F.2d 424, 429-30 (1968), stated that questions of when an option period commenced and how options were to be exercised were legal issues of contract interpretation—and not factual issues. The court said:

> The Board cannot convert these clearly legal issues of contract interpretation into factual issues simply by resolving them in terms of the intent of the parties. . . .
>
> . . . If the Board could make binding decisions on matters of contract interpretation merely by speaking in terms of the intent of the parties, the Wunderlich Act would be robbed of much of its

> purpose. Accordingly, this court is not bound by the Board's decision, but is free to decide this case in accordance with its own view of the law.

Id. at 72, 389 F.2d at 429-30.

Both parties, the Board and the court all agree that the contract clearly provided that the defendant could exercise its option for Chains 2 and 3 at any time during performance of the contract and for a period of time not exceeding 120 days after final acceptance of Chain 1. The difficulty with this seemingly simple issue is in establishing the date of final acceptance of Chain 1. Plaintiff claims that the following term in the contract Schedule, as amended, is of great probative value in making this determination:

> Inspection at origin. Final inspection and acceptance upon successful completion of DT&E Field Test at destination.

Plaintiff advocates that this means just what it says; final acceptance occurs when the DT&E Field Test is successfully completed. Defendant is just as adamant that an interpretation of the entire contract shows that final acceptance did not occur until the DD250 was signed by defendant's Program Director.

Plaintiff has asked the court to ascertain the intent of the parties in order to properly interpret the contract. This, the court will not do for the reasons set out in *Dynamics Corp. of America v. United States*, 182 Ct. Cl. 67, 72, 389 F.2d 424, 429-30 (1968). What the court will do is review the decision of the ASBCA which will include an analysis of the intent of the parties, as well as other factors. The Board properly concluded that in order to resolve the dispute the contract must be interpreted to give effect to all parts of the agreement if possible and bring seemingly disparate provisions to read as one. *SCM Corp. v. United States*, 230 Ct. Cl. 199, 675 F.2d 280 (1982); *Merando, Inc. v. United States*, 201 Ct. Cl. 28, 475 F.2d 603 (1973). The general rule is that contracts are to be read as a whole so as not to

leave one or more terms meaningless or useless. *Astro-Space Laboratories, Inc. v. United States*, 200 Ct. Cl. 282, 470 F.2d 1003 (1972); *Jamsar, Inc. v. United States*, 194 Ct. Cl. 819, 442 F.2d 930 (1971). "[T]his court must be guided by the well-accepted and basic principle that a contract should be interpreted to give effect to all parts of an agreement. An interpretation which gives reasonable meaning to all provisions is preferred to one which renders a provision useless or meaningless." *SCM Corp. v. United States*, 230 Ct. Cl. 199, 203-04, 675 F.2d 280, 283 (1982). The court in *Thanet Corp. v. United States*, 219 Ct. Cl. 75, 591 F.2d 629 (1979), perhaps said it best:

> Provisions of a contract must be construed so as to effectuate the spirit and purpose of the contract. The agreement must be considered as a whole, and interpreted so as to harmonize and give meaning to all its provisions.

Id. at 82, 591 F.2d at 633.

At times, however, the terms of a contract are so disparate that they cannot be read together and interpretive procedures must be used to find the proper interpretation. One interpretive procedure which could be used in the absence of any guidance from within the contract itself is the rule of *contra proferentem* which seeks to resolve the ambiguity by construing offending terms in a contract against the drafter of the language which is usually, but not always, the government. *Department of Natural Resources & Conservation v. United States*, 1 Cl Ct. 727, 737 (1983); *WPC Enterprises v. United States*, 163 Ct. Cl. 1, 323 F.2d 874 (1963). When the government drafts the contract and uses language that is susceptible to more than one meaning and the intention of both parties is not discernible, the meaning given it by the contractor will prevail. The rule of *contra proferentem*, "puts the risk of ambiguity, lack of clarity, and absence of proper warning on the drafting party . . . ." *Sturm v. United States*, 190 Ct. Cl. 691, 421 F.2d

723 (1970); *see also Peter Kiewit Sons' Co v. United States*, 109 Ct. Cl. 390, 418 (1947).

Another interpretive procedure is when the parties by mutual consent, prior to the execution of a contract, agree upon a scheme for interpreting the contract should it be discovered at a later date that one or more terms must be rendered useless and meaningless because it or they are so disparate they cannot be read together. One popular format for this is a separate contract clause stating which terms have precedence over other terms.

As plaintiff accurately points out, the parties in this case agreed in the Order of Precedence clause contained in the Special (or Other) Provisions of the contract that certain terms of the contract would have precedence over other items in the event of any inconsistency. Its purpose is such that if there are inconsistencies within the terms of the contract subordinate clause(s) must bow to and be disregarded when there is an inconsistent higher priority clause in the contract. As noted in *John A. Volpe Construction Co.*, 68-1 BCA ¶ 6857, an Order of Precedence clause "has been consistently recognized as a legally valid and fully effective agreement by the parties as to how their contract is to be interpreted." *Id.* The Board, in the instant case, found it possible to "harmonize all contract provisions relating to inspection, testing, delivery and acceptance without creating conflicts between them or rendering some of the provisions meaningless." The court is not as sanguine.

The contract Schedule stated that final inspection and acceptance of Chain 1 would occur upon successful completion of the DT&E Field Test. Depending upon what was included in the DT&E Field Test that test was completed either on February 3 or March 1, 1978. Subordinate terms, as per the Order of Precedence Clause contained in inconsistent acceptance terms, such as terms which forbade acceptance until (1) the contracting officer had acknowledged completion of the Preliminary

Design Review, Critical Design Review, Functional Configuration Audits, Physical Configuration Audit and the Formal Qualification review; (2) each item had been tested successfully; (3) DT&E had been successfully completed; and (4) design deficiencies corrected; and (5) a properly filled out DD250 was executed.

The court need go no further to show inconsistent terms of the contract that cannot be harmonized. Consider: one term of the contract specifies acceptance upon successful completion of the DT&E Field Tests. Another forbids acceptance until all tests and audits are final, DT&E is completed, all design deficiencies corrected, and a DD250 executed. The court notes that the former term referred to the DT&E Field Test and the latter to DT&E without the modifier "Field Test" which, we assume, presupposed some higher level or final test, as opposed to a field or intermediate test even though there was no higher level DT&E referenced in the contract. Common sense tells us that a DT&E Field Test is not the same as an unmodified DT&E, which would read "Final DT&E," or something akin to that. Even the Board was concerned with what constituted "finalization of DT&E." Either Chain 1 was accepted at the time of completion of DT&E Field Tests, or following formal completion of several other items, including the completion of design deficiencies even though under a separate provision plaintiff was required to correct design deficiencies as a part of its warranty. The "Order of Precedence" clause was designed expressly to address this kind of inconsistency. As we have said, an interpretation which would give a reasonable effect to all parts of the contract is clearly preferred to one which leaves a part of the contract useless, but this result is sometimes impossible to reach. Government contracts are long and complex and the draftsmanship oftentimes displays a deplorable lack of care by the drafters, as appears here. When terms of a contract are inconsistent, and each could be dispositive,

an order of precedence must be established.[11] Hence, the "Order of Precedence" clause. *See* Restatement (Second) & Contracts § 299(a) (Tent. Draft, 1973).

Inasmuch as the purpose of determining the acceptance date of Chain 1 is to discover the beginning date of the 120-day option period the court is bound to construe the terms of the contract strictly. Indeed, the general attitude of the courts and the ASBCA is to strictly construe contractual option provisions because the options subject contractors to potentially major risks which should not be extended beyond the limits the contractor had agreed to accept. In one instance, the ASBCA refused to uphold the agency's exercise of an option because the exercise was one day late. *Space-Age Engineering, Inc.*, 78-2 BCA ¶ 13,543.

In the instant case, the ASBCA determined that it was not required to interpret the contract option provisions but, rather, the term "final acceptance," as used in the Inspection and Acceptance clause and that, therefore, "the strict interpretation rules, whatever they may mean in this context, are not applicable." The court disagrees. The final acceptance language of the Inspection and Acceptance clause of the contract was an integral part of the option provision inasmuch as the trigger date for the 120-day option period was the date Chain 1 was finally accepted. Because this is a question of contract interpretation the court is not bound by the Board's interpretation, but is free to decide this case in accordance with its own view of the law. *International Telephone & Telegraph v. United States*, 197 Ct. Cl. 11, 543 F.2d

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[11] "Inconsistent" is defined as "[m]utually repugnant or contradictory; contrary, the one to the other, so that both cannot stand, but the acceptance or establishment of the one implies the abrogation or abandonment of the other; as, in speaking of "inconsistent defenses,' or the repeal by statute of 'all laws inconsistent herewith.'" *Blacks Law Dictionary*, 689 (rev. 5th ed. 1979).

1283 (1972). *Dynamics Corp. of America v. United States*, 182 Ct. Cl. 62, 389 F.2d 424 (1968).

The court finds that the various terms affecting and defining acceptance of Chain 1 cannot be interpreted so as to give them all effect. The terms cannot merely be read as appearing to be conflicting and then tinkered with, such as by reading them out of context, ignoring their plain meaning, etc. The acceptance terms of this contract are inconsistent and one or more must fall.

The court agrees with the Board's conclusion that FCA, FQR and PCA were part of DT&E. The Board found that FCA and FQR were both completed prior to March 1, 1978. PCA was conditionally approved in early February 1978. The reason it was not unconditionally approved was because there were some discrepancies between the drawings and the equipment, but not so great as to cause rejection. The Board found that PCA was formally completed sometime in April 1978, but notwithstanding the lack of formal completion, defendant conducted IOT&E based upon the PCA conditional approval. The record below shows that conditional approval of PCA was made on February 9, 1978 and that defendant went forward with IOT&E prior to formal PCA acceptance because the discrepancies were so minor that IOT&E could be conducted safely while plaintiff continued to check the drawings against the actual equipment. The significance of this issue goes to the Board's finding that the contract was accepted on March 20, 1978, when a DD250 was executed for Chain 1. The court agrees with the Board that final acceptance occurred prior to formal completion of PCA in April, 1978.

The Board ignored a stipulation reached by the parties at the administrative level ostensibly because it was not necessary to support the decision reached by the Board. Under the court's view the stipulation is important. The stipulation read that if FCA and FQR were found by the Board not to be part of DT&E tests then DT&E testing

was completed on February 3, 1978, if they were found to be part of DT&E tests then DT&E testing was completed on March 1, 1978. The significance of the February 3, 1978 date is that on that day plaintiff completed all of the tests identified as tests in the Statement of Work, Task No. 1, Test. The Board found that FCA and FQR were completed subsequent to February 3, 1978 but on or prior to March 1, 1978. PCA was not referred to again.[12] The court must hold that all tests, including especially, DT&E Field Tests were completed by March 1, 1978. The stipulation of the parties was improperly ignored by the Board and, at the least, should have been addressed. In *Gresham & Co. v. United States*, 200 Ct. Cl. 97, 470 F.2d 542 (1972), our predecessor court held that a stipulation of the parties is dispositive of the issue of whether government inspectors agreed with the contractor's interpretation of the specifications because a "stipulation is a judicial admission binding on the parties . . . ." *Id.* at 112, 470 F.2d at 551. It is binding on the Board and it is binding on this court in the absence of any factors to the contrary such as coercion, fraud, impossibility, etc.

The court is well aware that its conclusions, so far fly in the face of the Board's legal conclusion that Chain 1 could only be accepted by the proper execution of a DD250 following some undesignated period of time for defendant to contemplate the effects of the test results. The court disagrees with both conclusions. It may well be that execution of a DD250 is the generally recognized method for acceptance of an item in government contracting but this ignores the fact that the parties may, as they did here, mutually agree to another form of acceptance, *i.e.*, the event of completion of the DT&E Field Tests. The court also sees no reason why the parties

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[12] It is readily apparent to the court that PCA is a component part of FQR and since FQR was completed prior to March 1, 1978 the conditionally accepted status of PCA must have been sufficient to the parties, and the Board, and, it should be added, the court.

could not agree to acceptance automatically predicated upon the same or some other event. Legal precedent establishes that there is no requirement that government acceptance be accomplished only by the joint execution of a formal DD250. Acceptance may be effected upon the happening of a stated event. *See Raymond-Kaiser-Macco-Puget Sound*, 66-1 BCA ¶ 5,498, where acceptance occurred upon the final inspection at a contractor's plant as provided in the contract because the final inspection disclosed no defects and regardless of the fact that the DD250's executed by the government stated that the inspection did not constitute government acceptance. *Tro-Tech Inc.* 68-1 BCA ¶ 6,828, held that where there was no formal written acceptance by the government, the Board nevertheless properly found that government acceptance was effected by inspection and payment where a contract provision baldly stated, "[a]cceptance will be the date the Veterans Administration receives satisfactory inspection or test report" (sic). There is no merit to the argument that to permit the parties to agree to their own manner of acceptance is improper because it would read out of the contract the "Material Inspection and Receiving Report" clause. The right of the parties to agree to ignore the clause is a valid right under the other terms of the contract and procurement law. The contract, as amended, made practically every item, subassembly audit, configuration, and so forth, subject to a separate test both individually and as assembled.[13] That being the case and following the Board's views a DD250 would have to be executed for most of those bits of the whole, which would have conceivably amounted to hundreds if not thousands of proffers and acceptances under the "Material Inspection and Receiving Report" with a corresponding DD250 for each. There is no evidence that such activity ever occurred.

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[13] "Assembled" in this sense does not mean just the entire Chain 1; it also includes subassemblies of many units less than the whole.

Moreover, the Board distilled from the contract that defendant did not intend for acceptance to be automatic upon the occurrence of successful completion of the DT&E Field Test, but that a completed DD250 at some unidentified later point in time was necessary to denote formal acceptance. We have dealt sufficiently with the latter issue. The Board looked at the word "upon" in the phrase "upon successful completion of DT&E Field Test," [14] and found that the word could be defined several different ways, such as, "at this moment" to "in the very near future." The Board did find that it could not support an interpretation of "upon" as synonymous with the occurrence of a particular event and not bureaucratically recorded by the proper officer on a correctly completed DD250. We disagree. Acceptance of Chain 1 occurred on March 1, 1978 and whether a DD250 was issued that day is irrelevant. The court finds that "upon" can mean many things and must be interpreted in light of its usage. In the context in which it is used in this case, the court finds that "upon," contrary to the Board's conclusion, means "now," concurrent with the successful conclusion of the DT&E Field Test. The court can easily understand why defendant wanted a completed DD250 to record the March 1, 1978 acceptance because the voluminous amount of information contained in it would clearly be to defendant's benefit. *See* ASPR § 30.8 Appendix I (1968).[15] The Board also concluded that the contract mandated that inspection must precede acceptance, citing the title and order of language in the Inspection and Acceptance clause of the General Provisions and the operative language of the contract schedule term

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[14] From the Schedulue, Section I—INSPECTION & ACCEPTANCE, "Inspection at origin. Final inspection and acceptance *upon successful completion of DT&E Field Test,* at destination." (Emphasis added.)

[15] The court sees no reason why a properly completed DD250 could not be executed at a later date to memorialize the earlier acceptance and to acquire the information required in a DD250.

controlling in this instance, that requires "[f]inal inspection and acceptance upon successful completion of DT&E Field Test at destination." This is not correct. At times, in government contracts acceptance may precede final inspection, but more importantly, the argument is moot. It has nothing to do with the ultimate decision; Chain 1 was accepted on March 1, 1978 even though plaintiff was obligated by the terms of the contract to continue unfinished tasks.[16]

One task which continued was refurbishment of land and Chain 1. "Section F—Description/Specifications" of the contract Schedule required plaintiff to restore and refurbish the land and Chain 1, "[u]pon successful completion of the DT&E field test [sic]." The clause continued, that plaintiff was to "refurbish and restore, including replacement (sic) if necessary all elements of the chain to a deliverable condition including (anything) . . . which may have been damaged in disassembling the chain 1 . . . ." Again, the Board has made the same error. It concluded that defendant's position was correct; that Chain 1 could not be accepted before refurbishment was completed and that refurbishment was a part of DT&E. The court again understands why defendant would probably have liked Chain 1 completely refurbished before acceptance, but that is not what it contracted for. Defendant received from plaintiff exactly what the contract called for, *i.e.*, refurbishment of the chain after successful completion of the DT&E Field

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[16] Plaintiff also alleges that the argument of whether inspection had to precede acceptance was raised by defendant as a "straw man" because inspection took place at its plant prior to delivery, and as required by the contract. The court will not consider this argument because it need not do so to resolve the appeal. The Board's address to this issue would lead you back to section 5.2 of the Statement of Work which forbids acceptance before inspection. The reader will remember that the court found section 5.2 of the Statement of Work to be subservient to and, in this instance, nullified by the Schedule.

Test. Defendant has been in the business of writing contracts for over 200 years and is capable of drafting contract language to describe accurately what it wants. To state otherwise is disingenuous. It is also not lost on the court that defendant did reserve to itself 120 days after acceptance of Chain 1 to evaluate the Chain, train military personnel to operate it (IOT&E), complete more testing and documentation, permit refurbishment, replace damaged parts (though this item was covered under the warranty provisions of the contract) and myriad other items of unfinished work. It is not that defendant did not have other options for accomplishing these goals. For example, defendant could have keyed acceptance to a later event than DT&E, or it could have allowed itself more time for the completion of any possible unfinished work by the contractor or itself, and as a corollary thereto, more time within which to make the decision of whether to exercise the option.

The final finding of the Board was that plaintiff maintained site security at the site(s) until March 18 or 20, 1978 thereby manifesting that acceptance by defendant had not occurred prior thereto. When plaintiff gave notice that it planned to withdraw its guard force on or about February 3 and March 1, 1978 because Chain 1 had been accepted, defendant refused to accept the responsibility for security, and so told plaintiff. The court believes as a result, plaintiff was forced by economic considerations to continue providing site security as it was required to do under the contract. Plaintiff had not been totally paid for its work on the contract and expensive equipment of its own and defendant's was on the site(s). Plaintiff's actions were completely reasonable in these circumstances. Defendant, operating under the false premise that it had not accepted Chain 1 until March 20, 1978, naturally refused responsibility for site security because, had it done so, that action would have presaged defendant's control over the real and personal property and have been inconsistent with defendant's

litigation position, that during the first few weeks of March 1978 it had not accepted Chain 1.

We have answered two of the three issues posed by the Board. Issue two asked, "[w]hat impact did completion of the last DT&E field test [sic], on 3 February 1978, have on commencement of the period within which the Government could exercise its option to purchase LORAN chains?" The answer is none, because the DT&E Field Test was not completed until March 1, 1978. The 120-day option period on Chains 2 and 3 began running concurrently with the March 1, 1978 automatic acceptance by defendant of Chain 1. Issue three was, "[i]f the option period did not begin on 3 February 1978, on what date did it commence and what event marked that milestone?" The option period began on March 1, 1978 as determined by the parties in the pertinent stipulation of facts and the Inspection and Acceptance Clause of the contract, as amended, which established the acceptance date of Chain 1 and the beginning of the option period as the day DT&E was successfully completed at destination.

The Board also asked "[w]hat was the impact of the implementation of the new billing schedule contained in the DD250 executed on 29 March 1977?" We agree with the Board on this issue. Briefly, plaintiff apparently encountered money-flow problems and requested, on March 29, 1977, that defendant revise the billing schedule. This was done through the submission of a DD250 (which exemplifies the confusion surrounding the use of DD250's). Defendant then issued amendment P00023 which divided line item 0001 (Chain 1) into three separate parts. This particular DD250 was addressed to line item 1.1 "Design, Develop, Fabricate and in Plant Test one each [LORAN CHAIN]." Plaintiff argued to defendant and the Board that the signature of defendant's Systems Program Director on that particular DD250 started the 120-day option period. The Board and this

court disagree with plaintiff. The execution of the System Program Director only operated to acknowledge the new billing schedule set out in the DD250. Plaintiff's argument carries no weight.

CONCLUSION

This case has been complex, complicated all the further, by a poorly drafted contract and an extremely well-crafted Board opinion that this court was required to disagree with, as a matter of law, on several issues including the primarily dispositive one; the date of acceptance of Chain 1 by defendant which started the running of the option period for Chains 2 and 3. That date was March 1, 1978 meaning, therefore, that the option was executed 135 days after acceptance of Chain 1. Accordingly, for the reasons given in this decision, plaintiff's Motion for Summary Judgment is granted; defendant's Cross-Motion for Summary Judgment is denied; the decision of the Armed Services Board of Contract Appeals is reversed and plaintiff is entitled to recover. The case is remanded to the ASBCA for further proceedings in accordance with RUSCC 60.1 and the holdings of this court and, as relevant to the determination of quantum. The proceedings in this court shall be stayed for a period of six months, or such other time as the court may allow upon motion of either party as the needs of this case may require. Counsel for plaintiff shall provide the court with a status report beginning 90 days from the issuance of this decision and every 30 days thereafter.

IT IS SO ORDERED.

/s/ Moody R. Tidwell
MOODY R. TIDWELL
Judge

APPENDIX C

ARMED SERVICES BOARD OF CONTRACT APPEALS

ASBCA No. 23448

Appeal of—
SPERRY RAND CORPORATION, SPERRY DIVISION
Under Contract No. F19628-74-C-0092

Appearances for the Appellant:

John Lloyd Rice, Esq.
John J. O'Conner, Esq.
Miller & Chevalier, Chartered
Washington, D.C.

Appearances for the Government:

Colonel William P. Rudland, USAF
Chief Trial Attorney
Major Gerald J. Brentnall, USAF
Patrick D. Quinn, Esq.
Trial Attorneys

OPINION BY
ADMINISTRATIVE JUDGE RIISMANDEL

This timely appeal presents a question as to whether the Government's exercise of an option provision in the contract was timely. At issue is the act marking commencement of the option period. A hearing was held and both parties have submitted briefs. Only entitlement is presented for the Board's consideration. This appeal is not subject to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601 *et seq.*

The record in this appeal consists of the Rule 4 submittals, supplemental Rule 4 documents presented by appellant, stipulations of fact and the transcript of the hearing.

FINDINGS OF FACT

The Contract

1. Contract F19628-74-C-0098 was entered into between Sperry Rand Corporation, Sperry Division (hereinafter appellant) and the Government with an effective date of 25 January 1974. The contract was a fixed price incentive fee (firm target) contract, requiring the design, fabrication, testing and delivery of a LORAN-D Ground Chain as contract line item 0001 at a target price of $13,430,000. Delivery of the basic chain was to occur two years after contract award date. (R4, tab 25, part II, section H)

2. LORAN-D is a precision navigation system used to provide navigational information and precision fixes within a tactical service area. This system represents an advanced generation of transportable, computer-controlled, solid waste long range navigation (LORAN) systems. The equipment transmits signals which can be received aboard aircraft or ships. The receiver determines location by interpreting the time differences between precisely controlled pulses from transmitters. The LORAN-D ground chain system consists of a transmitting chain (composed of from 3 to 5 high power pulse transmitters) and a ground monitor (to receive, process and score critical information related to transmissions of the system). The development of this equipment represented an advancement in the state of the art. Appellant experienced delays in connection with this program and was given extensions of time. (App. supp. R4, tab A-33 at 2; stip. 2; tr. 1/34-35, 73)

3. The contract granted to the Government the option to purchase up to three additional LORAN-D Ground

Chains (Chains 2, 3 and 4) at prices specified in the contract (app. supp. R4, tab A-22; stip. 1). The option had to be exercised "within 120 days after final acceptance by the Government of Item 0001 or by 76APR15 whichever is later" (contract schedule at 2).

4. In addition to the "Changes (1958 JAN)" and "Disputes (1958 JAN)" clauses, the contract contained the following provisions which pertain to this appeal:

> INSPECTION (1958 MAY)
>
> (a) All supplies (which term throughout this clause includes without limitation raw materials, components, intermediate assemblies, and end products) shall be subject to inspection and test by the Government, to the extent practicable at all times and places including the period of manufacture, and in any event prior to acceptance.
>
> * * * *
>
> TITLE AND RISK OF LOSS (1968 JUN)
>
> (a) Unless this contract specifically provides for earlier passage of title, title to supplies covered by this contract shall pass to the Government upon formal acceptance, regardless of when or where the Government takes physical possession.
>
> (b) (1) Unless this contract specifically provides otherwise, risk of loss of or damage to supplies covered by this contract shall remain with the Contractor until, and shall pass to the Government upon:
>
> (i) delivery of the supplies to a carrier, if transportation is f.o.b. origin;
>
> (ii) acceptance by the Government or delivery of possession of the supplies to the Government at the destination specified in this contract, whichever is later, if transportation is f.o.b. destination.

(2) Notwithstanding (1) above, the risk of loss or damage to supplies which so fail to conform to the contract as to give a right of rejection shall remain with the Contractor until cure or acceptance, at which time (1) above shall apply.

(c) Notwithstanding (b) above, the Contractor shall not be liable for loss of or damage to supplies caused by the negligence of officers, agents, or employees of the Government acting within the scope of their employment.

* * * *

MATERIAL INSPECTION AND RECEIVING REPORT (1969 DEC)

At the time of each delivery of supplies or services under this contract, the Contractor shall prepare and furnish to the Government a Material Inspection and Receiving Report in the manner and to the extent required by ASPR Appendix I, "Material Inspection and Receiving Report."

* * * *

PART II—THE SCHEDULE

SECTION E—SUPPLIES/SERVICES & PRICES

1. The Contractor shall design, fabricate, test and deliver the equipment, data, and services below in accordance with the documents set forth in Section F:

0001 LORAN Ground Chain, Tactical, Transportable, 1 each (Basic with Technical Alternate 2 Configuration)

* * * *

SECTION F—DESCRIPTION/SPECIFICATIONS

Item	*Basic Chain*	*Description*
0001	SOW para 7.1 & Spec Nos. SS-DCL-450A-S1; SS-DCL-450A-T1; SS-DCL-450A-M1 (Reference WBS Attach, Transmitting Set (level 2, Task 30) and Monitor Set (level 2, Task 30) and to include Dev. Test and Eval and Sys Proj Mgt SOW para 1, 7.1, 7.3 and tasks 1, 2, and 4-28.)	

Amendment #2 dated 75 JUL 08, Task 31, Transmitter Antenna Fence" attached hereto and hereby made a part hereof.

IAW Annex "A" to SOW & Spec No. SS-DCL-450A-T1, Para 3.2.1..2 and Section 4.

* * * *

The following is added to Task 1 of the SOW:

Location of DT&E. Field testing of the first chain is to be accomplished in S.E. U.S. such that the location of the monitor and primary service area would be the Eglin, AFB, FL area. The three transmitter sites would have to be located in S.E. U.S. such that they provide 400 mile base legs, with open side of the TRIAD facing the Gulf of Mexico. Test sites to be selected for the DT&E testing in S.E. section of the U.S. shall be on Government-owned property.

Refurbishment and Restoration After DT&E. Upon successful completion of the DT&E field test, the contractor shall restore the sites to the condition they were in prior to the test. Also, the contractor shall refurbish and restore, including replacement if

necessary, all elements of the chain to a deliverable condition including any material and fixtures and other aspects which may have been damaged in disassembling the chain.

* * * *

Design Deficiencies. During or subsequent to DT&E the contractor shall correct any design deficiencies.

SECTION H—DELIVERIES OR PERFORMANCE

1. Delivery is required in accordance with the following schedule:

ITEM	QTY	F.O.B. POINT	ON OR BEFORE
0001	1 ea.	DT&E POINT (destination)	2 years after contract award date

* * * *

SECTION I—INSPECTION AND ACCEPTANCE

Items	
0001	Inspection at origin. Final inspection and acceptance upon successful completion of DT&E Field Test (at Eglin ABF, FL)

* * * *

SECTION J—SPECIAL PROVISIONS

* * * *

5. ORDER OF PRECEDENCE.

In the event of an inconsistency in this contract, unless otherwise provided herein, the inconsistency shall be resolved by giving precedence in the following descending order: 1) Schedule (excluding State-

ment of Work, the Specifications, and Contract Data Requirements List); 2) General Provisions; 3) the other provisions of the contract whether incorporated by reference or otherwise; 4) Statement of Work; 5) Contract Data Requirements List; 6) the Specifications (a. SS-DCL-450A-S1; b. SS-DCL-450A-T1; c. SS-DCL-450A-M1); 7) The Contractor's Technical Proposal as described in Section F.

* * * *

STATEMENT OF WORK

* * * *

5.0 *Delivery*

5.1 Delivery dates and quantities for Development Items shall be as specified in the schedule of the contract of which this SOW is a part. Acceptance by the Government of the LORAN D Ground Chain Equipment shall be accomplished at the Configuration Item level.

5.2 Configuration Items will not be accepted until the following conditions are met.

5.2.1 The Contracting Officer has acknowledged completion of Preliminary Design Review, Critical Design Review, Functional Configuration Audits, Physical Configuration Audit, Formal Qualification Review.

5.2.2 One or more of each Configuration Item has been qualified and tested in accordance with Government approved test plan, procedures and meet the specification requirements.

5.2.3 The Configuration Items have satisfactorily passed acceptance test in accordance with Acceptance Test Plans, Procedures, and Specifications which have been previously approved by the Contracting Officer.

5.2.4 Acceptance will take place following successful completion of DT&E and correction of design deficiencies.

* * * *

7.2 *Development Test and Evaluation* The contractor shall perform development tests and evaluations as specified in Task 1 of SOW and Specifications SS-DCL-450A-S-1, SS-DCL-450A-T-1, SS-DCL-450A-M-1 and development specifications.

TASK 1

TEST

6. *Acceptance* Final acceptance of all contractor provided equipments, services, and materials shall be accomplished upon both the successful completion of System Tests and the clearing of all test and design discrepancies from all test phases.

* * * *

5. "DT&E" is an acronym for Development, Test and Evaluation. This is a process through which a mechanism is subjected to a series of tests in order to establish that the equipment meets the performance levels set forth in the specifications. (Tr. 1/40, 75, 3/110) DT&E testing, which is common to contracts with technical requirements, is developed from a test plan prepared by the contractor and approved by the Government (tr. 1/42-43, 75, 81, 2/15). In this contract, the DT&E test plan was quite extensive, requiring over 150 tests for all phases of the system's performance (tr. 1/47, 74). By the terms of the contract, appellant was required to perform DT&E testing (R4, tab 25 at 5; tr. 1/39).

6. In addition, the systems had to pass a Physical Configuration Audit (PCA), Functional Configuration Audit (FCA) and Formal Qualification Review (FQR) (tr. 2/52, 3/124).

7. The purpose of PCA is to compare the actual equipment test results with the technical data describing the equipment in order to identify any discrepancies needing correction (tr. 2/106, 3/103, 121).

8. The purpose of FQR is to accumulate all data from the different tests and to review them as a package. By reviewing these test results and the result of the FCA, it can be determined whether the equipment conforms to the specifications and is suitable for the intended use. (Tr. 1/54, 2/12, 105)

9. The purpose of FCA, an underpinning to FQR, is to examine results of tests and compare them with specification requirements to ascertain if the tests were conducted properly in accordance with accepted test procedures and that the test results demonstrated that the particular component conformed to the tests (tr. 2/12, 64, 104-05).

10. Data underlying the testing phase was covered under separate Line Item 0006 and is not involved in the consideration of when acceptance of Line Item 0001 occurred (R4, tab 25 at 2).

Contract Performance

11. During the course of contract performance, the parties entered into numerous modifications (R4, tabs 26-51). None of these modifications changed the contract option prices (tr. 1/118).

12. A negotiation memorandum prepared by appellant on 4 June 1975 contained the following information vis-a-vis "Option Dates":

> Proposed 120 days after delivery of Chain 1 hardware as period within which they can purchase options for Chains 2, 3 and 4 at target prices currently stipulated by contract. Accepted.

(App. supp. R4, tab A-1)

13. During negotiations between the parties on 23 June 1975, the Government's contract negotiator advised appellant that any supplemental agreement would include language to the effect that the Government could order the option quantities at any time, but no later than 120 days after delivery of Item 0001 (R4, tab 71).

14. Modification P00007 to the contract, negotiated pursuant to 10 U.S.C. § 2304(a)(10), was executed on 28 July 1975. This modification extended the time for delivery of the basic claim by eight months and provided, *inter alia*, that with regard to both Chain 1 and Chain 2, the "Government may exercise this option at any time during contract performance, *but not later than 120 days after final acceptance by the Government of Item 0001.*" (Emphasis supplied) Item 0001 of Section I, "Inspection and Acceptance" was modified to read as follows:

> 0001 Inspection at origin. Final inspection and acceptance upon successful completion of DT&E Field Test at destination.

(R4, tab 32)

15. A "Program Schedule" (AFSC Form 103) was incorporated into Modification P00007, reflecting that the completion of DT&E, Functional Qualification Review and "AF accept chain" all would occur on 25 September 1976 (R4, tab 32 at 8, tabs 68, 70; tr. 1/93-94, 123-124).

16. Contract management reviews were conducted by appellant during the term of the contract. Representatives of appellant and the Government were present at these meetings. In a contractor management review conducted in July 1975, "Critical Field Test Milestones" were depicted as follows:

FIELD TEST MILESTONES

COMPLETE FIELD DT&E	9/25/76
COMPLETE FQR	9/25/76
AF ACCEPT CHAIN	9/25/76
DELIVER DT&E REPORTS	10/25/76

(Exh. A-8 at A-8). The same timetable was set forth in contractor management reports prepared in October and December 1975 (exh. A-9 at A-8, A-10 at A-8; tr. 1/107).

17. Modification P00021 was executed on 2 June 1976, with the express purpose of providing "confidence testing at the Wildwood, N. J. High Power Test Site." (R4, tab 46) A program schedule was attached to this bilateral Modification and provided:

	Completion Date
FIELD TEST MILESTONES	
COMPLETE FIELD DT&E	26 Oct 76
FUNCTIONAL QUALIFICATION REVIEW	26 Oct 76
AF ACCEPT CHAIN	1 Nov 76
DELIVER DT&E REPORTS	26 Nov 76

(R4, tab 46). At the request of appellant, this timetable provided one week for refurbishment after the completion of testing and before acceptance, for it was anticipated that the equipment on the site would have "taken a beating." This week also was available in order to correct any problems discovered during testing. Tr. 2/185, 3/7-8, 28-29; R4, tab 81)

18. Modification P00021 also amended the statement of work as follows:

Task 17—Configuration Management

1. Delete paragraph 4.b and substitute the following: Physical Configuration Audit. The contractor and the procuring activity shall conduct an incremental Physical Configuration Audit on the first production unit of each configuration item, in accordance with MIL-STD-483 (USAF), and appendix XII thereto. Physical Configuration Audit on all Configuration Items shall be completed not later than "end of DT&E." The contractor is responsible for the conduct of the audit, MIL-R-83313 (USAF)

will be used as a guide. (Note DIDs DI-A-3029/S-105 and DI-E-3118/C-131-1).

(R4, tab 46, att. 1 at 2)

Thus, PCA had to be performed on the first production unit of each Configuration Item prior to the completion of DT&E. Every component in each LORAN chain was a configuration item. (Tr. 3/98)

19. In 1975 and 1976, appellant requested that the Government grant it financial relief by means of converting progress payments to revenue through use of a provisional billing system or an economic price adjustment clause (R4, tabs 1, 4, 5, 6, 7, 8, 10, 11).

20. After lengthy negotiations, Modification P00023 to the contract was executed on 29 March 1977. This bilateral modification extended the contract delivery schedule to 30 June 1977 and provided for a revised billing schedule. (R4, tab 48) By means of the revised billing schedule, appellant was able to convert progress payments into earnings for its accounting purposes (tr. 1/128-30, 2/60). Upon appellant's suggestion, Line Item 0001 was divided into three subparts solely for billing purposes, in order to accomplish this new billing and payment method. Modification P00023 did not alter the terms of Section E or Section H of the contract schedule. (Tr. 2/178, 183, 3/10-12; stip. 8.

21. The billing schedule added by Modification P00023 subitemized Line Item 0001 as follows:

SECTION J—Add the following clauses:

27. BILLING SCHEDULE:

The parties hereby agree to the Contract Billing Schedule as set forth below which sub-itemizes CLIN 0001 as follows:

		Billing Price
1.1	Design, Develop, Fabricate and In Plant Test one each LORAN GROUND CHAIN	$12,500,000

1.2 Field System Test to include Environmental, Maintainability, Segment, and System Testing (less High Power Test) plus residual tasks from 1.1 and Data (less A052 and A093)	692,956
1.3 Data A052 and 093	450,000

Notwithstanding the provisions of the 'Payment' and 'Incentive Price Revision (Firm)' clauses of this contract, the above billing price break out shall not entitle the contractor to voucher for or receive payments in excess of the amounts it would be entitled to receive under the 'Progress Payments' clause if CLIN 0001 had not been sub-itemized.

(R4, tab 48 at 10)

22. On 29 March 1977, a "Material Inspection and Receiving Report" DD Form 250, (hereinafter "DD250") was signed on behalf of the Government accepting contract line item 1.1, except for certain residual tasks set forth in accompanying documents (app. supp. R4, tab A-6). The System Program Director (SPD) for the Air Force signed the DD250, but did not check the box indicating that his signature amounted to acceptance of the chain in the block provided in the document. As of 29 March 1977, appellant successfully had completed design development and in-plant tests of the basic LORAN chain and had accomplished transportability, environmental, functional and acceptance tests successfully, except for the residual items designated in the DD250. The Reliability Demonstration which was a part of the Field System Test had not been performed. (Stip. 10) There is no evidence that the Government accepted anything other than work already performed pursuant to the revised billing schedule of Modification P00023 when the 29 March 1977 DD250 was signed (tr. 1/139, 2/66, 179, 3/15). Indeed, Block 16 of the document described the item accepted in the terms of Item 1.1 as the "billing schedule" only (app. supp. R4, tab A-6).

23. Reliability testing of the LORAN system was performed in the field (tr. 2/110). Because the operability

of the system in terms of the specification requirements could be determined only through field testing, four sites were used. Eglin AFB served as the monitor site and the three triangulation legs of the system were located in Raiford, Florida, Kisatchie, Louisiana, and Anniston, Alabama. (Tr. 2/109-10, 3/44)

24. In a Production Progress Report for November 1977, appellant stated, *inter alia*, that "the balance of program tasks including all test effort, design review, refurbishment, system acceptance and delivery is scheduled to be completed by 15 May 1978" (R4, tab 185). This prediction was repeated in the Production Progress Report for December 1977 (R4, tab 186).

25. The Production Progress Report for January 1978 estimated a completion date of 10 March 1978, and stated:

> Reliability demonstration tests have been completed. The balance of program tasks including antenna teardown, design reviews, refurbishment, system acceptance and delivery is scheduled to be completed by March 1978.

(R4, tab 187)

26. On 23 January 1978, an inter-office memorandum prepared by appellant revealed that a number of components were missing from the LORAN assembly at Eglin AFB. Correction of these deficiencies was required on or before 30 January 1978. (R4, tab 92)

27. In a meeting between the parties on 25 January 1978, Mr. Jack Regan, a Sperry representative, indicated a desire to get a DD250 signed for Item 1.2, since this action would "start the clock" in so far as the option period was concerned. At that meeting, appellant also indicated that it considered the DD250 executed on 29 March 1977 to represent final acceptance of Item 1.1. (R4, tab 94)

28. On 26 January 1978, appellant forwarded a DD250 for Item 1.2 to the Government, requesting that it be executed upon completion of PCA at the Anniston site (R4, tab 107).

29. In a meeting held on 2 February 1978, Mr. Ralph D'Avino, appellant's program manager, requested that the Government execute a DD250 upon completion of the "on-site" portion of PCA, which was scheduled to occur on 15 February 1978 (R4, tab 99). The Government did not accede to Mr. D'Avino's wishes.

30. Testing had occurred in the field throughout 1977, and on 3 February 1978, the last scheduled test, antenna teardown demonstration was performed successfully (tr. 1/74-75, 79, 98, 2/47, 51; app. supp. R4, tab A-32). The successful completion of these tests demonstrated the ability of the LORAN chain to function in accordance with the contract requirements (tr. 1/50 77).

31. Minor problems existed with respect to the equipment upon the conclusion of the last test of DT&E. These problems were confined to missing components and worn insulation, and were remedied during appellant's refurbishing efforts. (Tr. 2/7, 119-20; R4, tab 18 at attachment 1)

32. Beginning on 3 February 1978 and continuing until 18 March 1978, appellant performed refurbishment work on the equipment at the sites, in order to make it ready for the Government's testing in the Initial Operating Test and Evaluation (IOT&E) program once the equipment was accepted (tr. 2/25, 114, 3/56, 62).

33. The field portion of the PCA, whereby the hardware was examined in light of the drawings, was completed on 9 February 1978 (tr. 3/87). The PCA performed at Anniston, Alabama required two weeks and found discrepancies (tr. 2/130). However, the PCA was not formally completed until April 1978 (tr. 3/87).

34. An inter-offce memorandum prepared by Sperry personnel on 24 February 1978 stated that acceptance

had not yet occurred (R4, tab 110). A letter from the contracting office to appellant on 27 February 1978 discussed acceptance as a future event (R4, tab 111).

35. FCA was completed on 28 February 1978 and FQR was completed on 1 March 1978 (tr. 1/60, 87, 2/37, 3/30-31).

36. An "Engineering Development" report issued by appellant for the period 1-28 February 1978 contained the note that:

> *The only remaining program tasks are completion of refurbishment and acceptance of transmitter sites and completion of CDPL data items.*

(R4, tab 189 at 2). This corresponds to a Government "Production Progress Report" (DD Form 375C) for the period of February 1978, which related that:

> Loran Chain—All program tasks have been completed except for refurbishment and acceptance of transmitter sites which is scheduled to be completed by mid March.

(R4, tab 190)

37. A Program Progress Report prepared by appellant dated 13 March 1978 contained the same information (R4, tab 188, 190).

38. From 27 February 1978 until 18 March 1978, the Government's Quality Assurance Representative (QAR) had been conducting acceptance tests at the four sites, in accordance with paragraph 5.2.3 of the Statement of Work, to assure that the system operated functionally (tr. 2/45-53; R4, tab 197). The last acceptance test was accomplished on 18 March 1978 but the inspector's certification letter was dated 17 March (R4, tab 197; tr. 3/53). This completed the inspection process on the entire LORAN chain (tr. 3/61).

39. Appellant performed refurbishment and restoration work at each site prior to inspection. These efforts concluded on 18 March 1978. (Stip. 13)

40. On 20 March 1978, the Government QAR and the System Program Director (SPD) signed the DD250 prepared and submitted by appellant in accordance with the "Material Inspection and Receiving Report" clause for Line Item 0001, "LORAN Ground Chain, Tactical, Transportable (Basic with Mechanical Alternative 2 Configuration)" (stip. 13; R4, tab 21; tr. 3/53). This document reflected that the chain was "shipped" on 17 March 1978 (R4, tab 197). The SPD checked the "acceptance" box in block 21B of the DD250. The Government's signature on the DD250 represented that all tests had been evaluated and the DT&E had been completed successfully (tr. 2/18).

41. Execution of the DD250 is the recognized method for acceptance in Government contracts (tr. 2/17, 61, 155).

42. On 21 March 1973, after the signing of the DD250, the Government embarked on an Initial Operating Test and Evaluation program (IOTE), the purpose of which was to permit Government personnel to assure that they could operate the systems as successfully as appellant's employees (tr. 2/19, 123, 133). The contractor's participation in this program was limited to furnishing a number of engineers as support personnel for a period of three months. Their services were "to begin after acceptance" of the system by the Government. (Item 0010 in Section F of the contract schedule, at R4, tab 25 and in Modification P00002 at R4, tab 27) IOTE is a crucial factor in the decision to exercise an option, and an option can be exercised only upon the successful completion of IOTE. A piece of equipment must be in a restored condition to order to be subjected to IOTE. As a result, the LORAN chain in this case had to be refurbished prior to the performance of IOTE. (Tr. 2/20, 144, 158) IOTE cannot be performed until DT&E is complete (tr. 2/132-33).

43. Performance of IOTE consumed 60 days. Upon its successful completion, the Government reviewed the test data and concluded that Government personnel could operate the equipment and that it met the specified perfomance levels set forth in the contract. (Tr. 2/19-20)

44. In correspondence to the Government dated 20 April 1978, appellant acknowledged that the system had been formally accepted on 20 March 1978 (R4, tab 199).

45. There is no evidence of any comment by appellant on 3 June 1978 (the 120th day following 3 February 1978) when the Government had not exercised its option for chains 2 and 3.

46. Through unilateral Modification P00026 dated 6 July 1978 and received by appellant on 14 July 1978, the Government advised appellant that, *inter alia*:

> Options for CLIN 0002 (Chain 2), CLIN 0003 (Chain 3), and related Data CLIN 0012 are hereby exercised and a contract modification to that effect was mailed to Sperry Gyroscope Division on 7 Jul 78.

(R4, tab 51; stip. 14)

47. 14 July 1978 marked the 161st day following 3 February 1978 and the 116th day subsequent to 20 March 1978.

48. Appellant advised the Government in a letter dated 14 July 1978 that:

> Sperry acknowledges receipt on July 14, 1978 of your TWX and Contract Modification P00026 dated July 6, 1978 purporting to exercise options for CLINS 0002 and 0003 of Contract F19628-74-C-0098. You are hereby advised that for the reasons set forth below Sperry believes these options to be invalid and no longer exerciseable by the Department of the Air Force, and that the attempted exercise of these options at this date constitutes a con-

structive change to Contract F19628-74-C-0098 for which Sperry is entitled to an equitable adjustment in contract price and contract schedule.

In recognition of the Air Force's acknowledged need for the equipment and services covered by the option, Sperry will proceed with CLINS 0002 and 0003 as a change to the contract, and will prepare and submit a claim for an equitable adjustment in the contract price and delivery schedule. Our claim will be filed within thirty (30) days and will be in an amount estimated to be between $4,000,000 and $5,000,000 at the target cost line. Sperry estimates that the time within which the Air Force must respond to this notice to minimize costs, delay or disruption of performance is seven (7) days.

(R4, tab 22)

49. Essentially, appellant's problems stemmed from the inflationary period of the mid-1970's which adversely affected its projected costs for LORAN chains to be built after Chain 0001 (R4, tabs 86, 101).

50. Appellant made deliveries under protest and submitted a claim for equitable adjustment to the contract price in a letter dated 10 August 1978 (stip. 14).

51. Appellant's claim was denied in the contracting officer's final decision dated 31 October 1978 (R4, tab 24). Appellant took a timely appeal from the final decision.

Events Determining Acceptance

Completion of DT&E

52. At the hearing, appellant's witnesses advanced the position that acceptance simultaneously with the conclusion of the last DT&E test (tr. 1/106, 109, 2/42). The Government's witnesses contended that the option could not be triggered until all tests and all data procedures (FCA and FQR) had been completed (tr. 2/47).

53. DT&E under this contract was a comprehensive process whereby the new design was fabricated, implemented and tested, with the test results being analyzed to verify performance (tr. 3/124). DT&E testing was divided into two categories: category I, "Test Plan/Procedures, Subsystem Test" was to demonstrate that individual subsystems performed within the qualification requirements, while category II, "Test Plan/Procedures, System Test," would demonstrate how the system interacted to form a chain. Essentially, category I focused on individual component function, while category II concentrated on the operation of the chain as a whole. (Tr. 1/44-45; app. supp. R4, tab A-33) The DT&E field tests were category II tests.

54. The third leg of the DT&E triad, "evaluation," occurred throughout the DT&E program, but final results could be evaluated only after the testing process had ended (tr. 2/54, 104-06, 3/96).

55. Because of its unique evaluation position, FQR should be performed as late as possible in the DT&E process to ensure that as much data as possible is available for analysis. FQR fully falls within the ambit of "Evaluation" for purposes of DT&E. As such, we find that FQR is a component of DT&E and that DT&E is not complete until FQR has been performed. (Tr. 2/12, 63, 106)

56. While PCA does not evaluate the actual performance of a component, it functions as a part of DT&E, since it facilitates the discovery and correction of discrepancies (tr. 2/107, 3/86). Because of the interrelationship between DT&E and PCA/FQR, we find that DT&E was not complete until those two tests had been completed (tr. 3/135; R4, tab 25, Statement of Work at 57). FCA is a quality control function and an underpinning to FQR (tr. 2/12, 52, 64).

Refurbishment

57. By the language of Modification P00021, time was set aside after the completion of field testing so that the equipment could be refurbished. While the parties had anticipated that refurbishment after field tests would be necessary, Modification P00021 marked the first time that a specific time period was allowed for refurbishment. (Tr. 3/20; R4, tab 25 at 5) Refurbishment was required as part of DT&E, to restore the equipment to a safe, operable condition (tr. 2/64, 113). The parties originally thought that refurbishment would be a minor task (tr. 3/25).

58. Controversy existed over whether refurbishment was to commence upon the conclusion of DT&E testing as part of the scheduled work. Appellant's witnesses contended that it did not, while the Government's witnesses asserted that refurbishment was the last work to be performed on Chain 1 before acceptance. (Tr. 1/108, 2/45, 54, 3/106).

59. By the time DT&E field tests were complete, the equipment had been on site for over 1½ years and needed active refurbishment (tr. 1/51, 74, 77, 2/88).

60. The Government's witnesses contended that IOTE could not begin until the chain had been accepted, and the Government could accept only a refurbished chain (tr. 2/17-18, 70, 133, 151, 174, 3/79, 84-86; finding 32). Thus, until refurbishing was complete, the Government contended that it had not been tendered a product which could be accepted for purposes of the option.

Security

61. Under Modification P00023, appellant was required to provide site security until the chain was delivered to the Government (R4, tab 48). The parties defined "delivery" and "acceptance" to be synonymous (tr. 1/116, 2/15, 65, 154, 186, 3/15).

62. Initially, appellant indicated that it would cease providing site security at the end of January 1978 (tr. 2/155). However, in response to a letter dated January 1978 from the Government stating that appellant was required to provide security through delivery, appellant continued providing site security beyond 31 January 1978 (R4, tab 93).

63. In a meeting held on 2 February 1978, appellant suggested transferring the security obligation to the Government on 3 February 1978 (tr. 2/53). Appellant then revised its schedule to terminate site security on 15 February 1978 and agreed to provide site security service until 1 March 1978, in response to a telegram dated 14 February 1978 stating that "Sperry is required to provide site security services until acceptance of [Line Item] 001" (R4, tab 102; tr. 2/34). In fact, appellant provided guards at the site until 20 March 1978, the date the Government executed the DD250 (tr. 2/31, 115, 131, 156). While appellant claims that it continued to provide security at the sites solely because of the value of its equipment located there, we have no evidence of any claim by appellant for the costs of these services. (Tr. 2/98, 3/119) The most revealing indication of who exercised control over the equipment after 3 February 1978 came from Mr. Ralph D'Avino, appellant's Program Manager, who stated that appellant performed site security after 3 February 1978 because "*we* had approximately $15 million worth of equipment sitting [there]. (emphasis supplied). (Tr. 3/1119)

DECISION

This appeal raises three questions which can be framed as follows:

> 1. What was the impact of the implementation of the new billing schedule contained in the DD250 executed on 29 March 1977?

2. What impact did completion of the last DT&E field test, on 3 February 1978, have on commencement of the period within which the Government could exercise its option to purchase additional LORAN chains?

3. If the option period did not begin on 3 February 1978, on what date did it commence and what event marked that milestone?

The DD250 of 29 March 1977

Appellant urges upon us that execution of the DD250 for the revised billing schedule on 29 March 1977 constituted an acceptance under the contract and started the Government's 120 day option period for Chains 2 and 3. (Br. at 31) We disagree.

Adoption of the revised billing schedule through Modifications P00023 was undertaken to afford financial relief to appellant. It divided Line Item 0001 into three separate sub-categories, and the DD250 operated only with respect to Line Item 1.1, "Design, Develop, Fabricate and In Plant Test one each [LORAN Chain]." While the SPD (System Program Director) signed the DD250, he did not indicate that he was accepting the LORAN chain; he acknowledged only the revised billing schedule in the document.

In its brief, appellant relies upon two of this Board's cases, *Lear Siegler, Inc.*, ASBCA No. 12164, 69-1 BCA ¶ 7563, and *Keco Industries, Inc.*, ASBC No. 16645, 73-2 BCA ¶ 10,056.

Appellant cites *Lear Siegler, supra*, for the proposition that the "conditional" acceptance of the billing schedule operated to trigger the option period. (Br. at 34) The facts in *Lear Siegler* are distinguishable from the facts in the case at hand. In that case, the Government's option arose because of the conditional approval of a first item, subject to correction of deficiencies. Here, the sig-

nature of the SPD on the DD250 did not indicate acceptance of the LORAN chain; it only signified the implementation of a revised billing schedule.

Appellant also relies on *Keco Industries, Inc., supra,* to support its contention that the Government's option period commenced on 29 March 1977. Appellant's reliance on our holding in that case is misplaced. The Board held there that Government-caused delays in the delivery time for a product did not operate to extend the pertinent option period. (At 47,175) Here, the delays were not attributable to any Government action, but merely were the result of problems attendant to the development of a technologically novel apparatus. (Finding 2)

Appellant's contentions in its brief are not consistent with its conduct during performance. For example, in a meeting conducted on 25 January 1978, appellant admitted that the DD250 referred only to Item 1.1 (the billing schedule), and not the entire Line Item 0001. (Finding 26) It is well recognized that the conduct of the parties before the dispute arose is of great weight in interpreting the contract. *General Warehouse Tow, Inc. v. United States,* 181 Ct. Cl. 180, 389 F.2d 1016 (1967); *Chromalloy American Corporation,* ASBCA Nos. 22119, 22120, 80-2 BCA ¶ 14,566.

Therfore, we conclude that the DD250 executed on 29 March 1977 served only to enable payment in accordance with the new billing scheduled, did not constitute acceptance of the LORAN systems and did not "start the clock" on the Government's option period.

Completion of DT&E Field Tests and Acceptance

The parties agree that the term "final acceptance" in the option provision in Section E of the contract schedule had the same meaning as in Section I, Inspection and Acceptance, which provided for "[F]inal inspection and

acceptance upon successful completion of DT&E Field Test." This does not mean, however, that this term could be given different meanings for the purpose of exercising the option and for the operation of other provisions of the contract.

Since we are not interpreting the option provisions, but the term "final acceptance" as it appears in the "Inspection and Acceptance" provision, the strict interpretation rules, whatever they may mean in this context, are not applicable, despite the approach taken by the dissenting opinion.

Appellant contends that this language is unambiguous; acceptance for the purpose of exercising the option occurred simultaneously with or at the time of completion of the last DT&E field test on 3 February 1978 and before a DD250 was executed. (Br. at 27-28) In the alternative, appellant contends that DT&E was completed no later than 1 March 1978 when both FCA and FQR had been completed. (Br. at 22-23) In either case, the Government's option period would have expired on 6 July 1978, thus rendering the option exercise on 14 July 1978 untimely. (Br. at 23)

In opposition, the Government takes the position that the acceptance of the LORAN chain that started the 120-day option period did not occur until the DD250 was signed on 20 March 1978 and, consequently, exercise of the option for two additional systems on 14 July 1978 was timely.

In resolving contract disputes arising from the different readings the parties have attributed to contract language, the Board's function is to discern the parties' intent as this is expressed in the contract. *Dynamics Corporation of America v. United States*, 182 Ct. Cl. 62, 72, 389 F.2d 424, 429 (1968); *SCM Corporation v. United States*, —— Ct. Cl. ——, 675 F.2d 280, 283 (1982). We accomplish this by ascertaining the meaning to be given

to the words and manifestations in the contract in a process commonly referred to as interpretation. *Restatement (Second) of Contracts* § 226 (1973 Tent. Draft); 4 *Williston on Contracts*, §§ 600, 602 (3d ed. 1961); 3 *Corbin on Contracts* § 534 (1960).

The rules that govern the interpretation have been stated as follows:

> In attempting to give effect to the contracting parties' intent, the court is guided by the principles that "[t]he parties' intent must be gathered from the instrument as a whole." *Kenneth Reed Constr. Corp. v. United States*, 201 Ct. Cl. 282, 288, 475 F.2d 583, 586 (1973), preferably giving a reasonable meaning to all parts of the instrument rather than leaving a portion of it useless, *Martin Lane Company, Inc. v. United States*, 193 Ct. Cl. 203, 215, 432 F.2d 1013, 1019 (1970), from the perspective of a "reasonably intelligent person acquainted with the contemporary circumstances." *Firestone Tire & Rubber Co. v. United States*, 195 Ct. Cl. 21, 30, 444 F.2d 547, 551 (1971), and ascribing to the contract language "its ordinary and commonly accepted meaning", *Hol-Gar Manufacturing Corp. v. United States*, 169 Ct. Cl. 384, 390, 351 F.2d 972, 976 (1965), without twisted or strained out of context analysis, *Aero Mayflower Transit Co. v. United States*, 162 Ct .Cl. 233 (1963), or regarded to the subjective unexpressed intent of one of the parties. *Dana Corp. v. United States*, 200 Ct. Cl. 200, 214, 470 F.2d 1032, 1041 (1972); *John C. Kohler Co. v. United States*, 204 Ct. Cl. 777, 787, 498 F.2d 1360, 1365 (1974).

ITT Arctic Services, Inc. v. United States, 207 Ct. Cl. 743, 751, 524 F.2d 680 (1975).

For these rules to be considered, the language need not be ambiguous or the provisions conflicting, as appellant and the dissenting opinion insist, in our opinion errone-

ously. Even in the absence of ambiguity, contract language must be given a meaning which can be derived from a reading of the document by a reasonable person familiar with the surrounding circumstances. *W.G. Cornell Co. v. United States*, 179 Ct. Cl. 651, 670, 376 F.2d 299, 311 (1967). An authoritative commentator has stated:

> All contract language is potentially ambiguous and all contract language is potentially capable of being made unambiguous. Instead of starting with the question, "Is the contract ambiguous?", the proper approach to contract interpretation is to go directly to the question, "What does the contract mean with respect to this fact situation?"

Shedd, Jr., "Resolving Ambiguities in Interpretation of Government Contracts," 36 *Geo. Wash. L. Rev.* 1, 21 (1967); see also 3 *Corbin on Contracts*, *supra*, at § 535.

The problem with appellant's position is that it focuses on one isolated provision of the contract to the exclusion of all other pertinent provisions. See *Restatement (Second) of Contracts* § 228, comment d (1973 Tent. Draft). This narrow reading of the contract is exaggerated further by appellant's defining "upon" in the context to mean "*at the time* DT&E Field Test at destination is successfully completed" (reply br. at 1-2) (emphasis supplied), thus choosing one of the several possible meanings for this word. "Upon" is defined variously by Webster's *Third New International Dictionary* (1971) at 2517-18 as "immediately following upon," "very soon after," "on the occasion of" and "at the time of." See also *Black's Law Dictionary*, 981 (rev. 5th ed. 1979).

We disagree with appellant's propositions that the parties intended acceptance of the LORAN chain to occur upon occurrence of an event (i.e., the successful completion of the DT&E field tests) and that a completed DD250 was not required to denote acceptance.

The record does not support these propositions. A fair reading of the contractual provisions does not permit such a conclusion. On the contrary, the contract established a well-defined procedure from inspection to acceptance and we can find no indication that the parties intended to discard these contractual steps.

Although the parties regarded "delivery" and "acceptance" to be synonymous terms in the performance of this contract, the two terms represent two distinct actions within the entire contractual framework.

Section H of the contract schedule required delivery of the LORAN chain at the DT&E field site (destination). This was understood to mean that the equipment was to be tendered to Government personnel at the various field sites. Thus, as specified in the contract, delivery was used with reference to the time and place when and where transfer of possession was to occur. It was signified by the completion and submisison of a DD250 pursuant to the "Material Inspection and Receiving Report" clause, which provides, in pertinent part:

> At the time of each delivery of supplies or services under this contract, the Contractor *shall* prepare and furnish to the Government a Material Inspection and Receiving Report . . .

(emphasis supplied)

This act of delivery occurred at each site when the Government's Quality Assurance Representative (QAR) conducted his final inspection in the form of acceptance tests at each of the four sites. These acceptance tests were the conduct constituting "final inspection" within the meaning of Section I of the contract schedule. As such, inspection was completed only when the acceptance tests had been performed. The SPD confirmed delivery and acceptance at the destination by his signature on the DD250. (Finding 39) This procedure is consistent with the requirements of the Armed Services Procurement

Regulations (ASPR) when acceptance is to occur at destination. See ASPR App. I-301 (31 JAN. 1977).

> Acceptance is defined as follows in ASPR § 14-001.6:
>
> Acceptance means the act of an authorized representative of the Government by which the Government assumes for itself, or as agent of another, ownership of existing and identified supplies tendered or approves specific services rendered, as partial or complete performance of the contract on the part of the contractor.

The "Inspection" clause further provides that acceptance "shall be made as promptly as practicable after delivery except as otherwise provided in this contract" and that acceptance shall be conclusive (with exceptions not pertinent here).

However, it is important to note that acceptance not only follows delivery, but also is not contemplated to occur until all required inspection (including testing) has been completed. This is not only mandated by the "Inspection" clause, but also by Section I of the contract schedule that requires "[f]inal *inspection and acceptance* upon successful completion of DT&E Field Test at destination."

(emphasis supplied)

Appellant seems to ignore this point when it argues that acceptance of the LORAN chain occurred upon completion of the DT&E field tests. If this were the case, final inspection would be eliminated or reduced to a formality. Appellant has not shown how a final inspection could have been or was accomplished prior to the alleged acceptance of the system on 3 February 1978. Moreover, our comparison of the standard "Inspection" and "Material Inspection and Receiving Report" clauses with pertinent provisions of the contract schedule does not show any conflict or inconsistency between them. It also should be considered that such standard clauses

"cannot lightly be read out of it [the contract], or deprived of most [their] normal substance." *Thompson Ramo Woodridge Inc. v. United States*, 175 Ct. Cl. 527, 536, 361 F.2d 222, 229 (1966).

The specifics of the testing and inspection to be completed before acceptance of the LORAN system could occur were set forth in the Statement of Work and the description of various tasks. These provisions provided that after successful completion of the field tests, and before acceptance of the system, the contractor was required to correct all design deficiencies and the contracting officer must have acknowledged completion of preliminary design review, critical audits, physical configuration audit and formal qualification review. These tasks constituted the third leg of the DT&E triad, "evaluation." While evaluation occurred throughout the DT&E process, final results of the program could be evaluated only after the testing phase had ended. The language of paragraph 5.2 of the Statement of Work mandated that acceptance could occur only upon the completion of PCA, FCA and FQR. Since these procedures had not been completed by 3 February 1978, the LORAN chain could not be accepted by the Government on that date. Inasmuch as final inspection had to be completed before acceptance, we find no inconsistency between the contract schedule and the Statement of Work as appellant suggests.

Refurbishing of the Equipment After Testing

The PCA, FCA and FQR had been completed by 1 March 1978, and the only task appellant performed after that date was refurbishing of the equipment. This lasted until 18 March 1978. During the same period, the Government's QAR conducted his final inspection of the four sites by performing acceptance tests on the refurbished equipment.

There is no disagreement between the parties that when the DT&E field tests were completed, the LORAN

chain was in a deteriorated condition, owing to the fact that it had been exposed to the elements for over a year and needed active refurbishment.

Appellant argues, in the alternative, that the LORAN chain should have been accepted on 1 March 1978 since all contract requirements for DT&E had been satisfied. In appellant's opinion, refurbishing was not part of DT&E and was not required to be completed prior to acceptance.

The Government claims that the system could not have been accepted before refurbishment was completed, and this is what actually happened. We agree with the Government on this point.

The only contractual provision the parties have identified as requiring refurbishment of the equipment is found in Section F of the contract schedule as an addition to Task 1 of the Statement of Work. This requires the contractor to "refurbish and restore, including replacement if necessary, all elements of the chain to a *deliverable condition* . . ." after DT&E tests were completed. (emphasis supplied) During performance, the parties had recognized this requirement by scheduling a period of time after completion of the field portion of DT&E for refurbishment.

There is nothing to indicate that the parties contemplated acceptance of the entire system when the equipment was only partially refurbished or refurbishment had been completed at some of the sites. Quite to the contrary, appellant's own engineering development report for the period 1-28 February 1978 revealed that "the only remaining *program* tasks are completion of refurbishment. . . ." (emphasis supplied) (Finding 35) The fact that the parties recognized that refurbishment of the equipment at all sites would have to be accomplished before acceptance is shown by the requirement to have the equipment in "deliverable condition" as a result

of refurbishment. Delivery of the system had to occur before acceptance, and this refurbishment also had to be completed at that point.

This conclusion likewise is consistent with the immediate availability of the system after acceptance for the Government's performance of Initial Operating Test and Evaluation (IOTE). For these tests to be conducted, the equipment had to be in fully operable condition and it could not be in such a condition without having been refurbished. IOTE could start, and in fact did commence, immediately after acceptance of the system. Thus, refurbishment had to be completed by that time. Any refurbishment action or activity by the contractor after acceptance also would have been inconsistent with the possession and custody of the equipment transferring to the Government upon acceptance.

Providing Security at the Sites

Under the terms of the contract, appellant was required to provide site security until delivery. (Finding 60) Despite the disagreement which arose whenever appellant suggested that it would cease providing security, appellant provided security at the sites until 20 March 1978. (Findings 60-62)

In *John C. Kohler Co. v. United States*, 204 Ct. Cl. 777, 498 F.2d 1360 (1974), the Court held that when the Government takes control over an item and operates it, although some preconditions to acceptance have not occurred, the Government will be deemed to have accepted the item constructively (at 1367). While *Kohler* addresses the problem in terms of risk of loss, we believe it is instructive in this appeal.

Prior to 20 March 1978, the Government exerted no dominion and control over the LORAN chain equipment at any of the sites; it did not provide for their security. Indeed, had the Government provided security for the

equipment prior to 20 March 1978, it would have assumed a degree of control and financial responsibility inconsistent with its claim that it had not yet accepted the equipment. Thus, appellant's provision of security at the LORAN sites constituted an exercise of dominion and control over the equipment wholly inconsistent with a contention that the equipment already had been delivered to or accepted by the Government. Appellant's provision of site security at the LORAN sites rather was coincident and consistent with its control over the equipment, ending only with delivery/acceptance of the LORAN chain on 20 March 1978.

Conclusion

In summary, it is possible to harmonize all contract provisions relating to inspection, testing, delivery and acceptance without creating conflicts between them or rendering some of the provisions meaningless. In the absence of conflict, the "Order of Precedence" clause need not be called upon to establish the alleged primacy of the schedule "Inspection and Acceptance" provision over general provisions and specifications as suggested by appellant and in the dissenting opinion. *Thompson Ramo Wooldridge, Inc. v. United States, supra; Franchi Construction Company, Inc. v. United States,* 221 Ct. Cl. 796, 609 F.2d 984 (1979).

Therefore, we conclude that the Government accepted the LORAN chain (Item 0001), within the meaning of the option clause, on 20 March 1978 when the Program Director signed the DD250.

This was the "conclusive and decisive action by the Government upon which it determines through its authorized agents that, on the basis of all the facts within its knowledge, the contractor has satisfactorily performed his obligations under the contract." *C.H. McQuagge v. United States,* 197 F. Supp. 460, 468 (W.D. La. 1961).

We are unable to associate or identify any Government action of this significance with either of the dates suggested by appellant, namely 3 February 1978 or 1 March 1978. Even if final acceptance occurred immediately following conclusion of the QAR's final inspection on 17 March 1978, this still falls within the 120-day period for exercise of the option.

As the Government exercised its option on 14 July 1978, the 116th day subsequent to the date of acceptance, 20 March 1978, we conclude that it occurred within the 120 day requirement imposed by the contract and that the option thus was exercised in a timely fashion.

Accordingly, the appeal is denied.

Dated 27 September 1983.

/s/ V. John Riismandel
V. JOHN RIISMANDEL
Administrative Judge
Member of Division No. 4
Armed Services Board of
Contract Appeals

I *dissent* (see attached opinion)

I *concur*

/s/ Robert J. Gomez
ROBERT J. GOMEZ
Administrative Judge
Member of Division No. 4
Armed Services Board of
Contract Appeals

I *concur*

/s/ Maxwell C. Freudenberg
MAXWELL C. FREUDENBERG
Administrative Judge
Member of Division No. 4
Armed Services Board of
Contract Appeals

I *concur*

/s/ Harris J. Andrews, Jr.
HARRIS J. ANDREWS, JR.
Administrative Judge
Chairman, Armed Services
Board of Contract Appeals

/s/ Daniel M. Arons
DANIEL M. ARONS
Administrative Judge
Vice Chairman, Armed Services
Board of Contract Appeals

I certify that the foregoing is a true copy of the opinion and decision of the Armed Services Board of Contract Appeals in ASBCA No. 23448, Appeal of Sperry Rand Corporation, Sperry Division, rendered in conformance with the Board's Charter.

Dated: 30 Sep. 1983

/s/ George L. Hawkes
GEORGE L. HAWKES, Recorder
Armed Services Board of
Contract Appeals

DISSENTING OPINION BY ADMINISTRATIVE JUDGE GOMEZ

The "Inspection and Acceptance" paragraph of the Schedule clearly defines when final acceptance is to occur; thus, it is immaterial, when viewed in the context of the "Order of Precedence" clause whether other subordinate provisions define acceptance. Moreover, these other provisions are not inconsistent with the parties' express agreement that "final . . . acceptance" would occur ". . . upon the successful completion of the DT&E Field Test". While the "Inspection" clause requires acceptance to follow delivery, it also permits the parties to agree otherwise. In this regard, DAR 14-306(b) states that the provisions of a contract govern acceptance and that acceptance may be effected prior to delivery. Thus, there is nothing to prevent the parties from reaching the unambiguous agreement that they have, here.

Additionally, the occurrence of acceptance at the successful completion of the DT&E Field Test is most logical and does not prejudice respondent's interest in obtaining what it bargained for. We have found that ". . . the successful completion of these tests demonstrated the ability of the LORAN chain to function in accordance with the contract requirements. The minor problems which remained were of no concern. In contemplation of such problems, the subsequent refurbishing efforts were contractually timed to address them. (Findings 1, 30) The majority's concern that subsequent contractually required tasks such as the Physical and Functional Configuration Audits and Refurbishment and the concomitant acceptances and inspections were to occur after the DT&E Field Test have no bearing on the parties' clearly expressed intention that final acceptance for purposes of the option was to be measured by an earlier event. Appellant does not cite as an excuse that because final acceptance occurred, in this sense, it had no obligation to perform these tasks.

Finally, we have earlier held:

> An option is an offer couched in specific terms, the acceptance of which must be unconditional and in exact accord with the terms offered. The general attitude of the courts is to construct strictly this legal requirement.

General Dynamics Corp., ASBCA No. 20882, 77-1 BCA ¶ 12,504 at 60,622. We have consistent strictly construed option terms. *Space-Age Engineering, Inc.*, ASBCA No. 22901, 78-2 BCA ¶ 13,543 The Majority's conclusion that final acceptance did not occur until execution of the DD 250 requires us to ignore the clear agreement of the parties, to wit: that the option had to be exercised "within 120 days after final acceptance by the Government of item 0001", and that "[f]inal . . . acceptance [was to occur] upon successful completion of DT&E Field Test". Measured therefrom, there is no issue of fact that respondent's exercise of the option was untimely.

I would sustain the appeal.

/s/ Robert J. Gomez
ROBERT J. GOMEZ
Administrative Judge
Member of Division No. 4
Armed Services Board of
Contract Appeals

APPENDIX D

IN THE UNITED STATES CLAIMS COURT

No. 116-84 C

SPERRY CORPORATION

v.

THE UNITED STATES

JUDGMENT

Pursuant to the opinion of February 5, 1986, and the court's order dated May 19, 1987, allowing plaintiff's motion for entry of final judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff recover of and from the United States the sum of $6,121,590.00 plus simple interest at the rate established by the Secretary of the Treasury pursuant to PL 92-41, 85 Stat. 97 on $3,274,900.00 of that amount from April 1, 1987 until May 20, 1987. No costs.

FRANK T. PEARTREE

Clerk of Court

May 20, 1987

By: /s/ Linda A. Eddins
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RUSCC 72. Effective May 1, 1987, RUSCC 77(k)(2) is amended to read:

"Filing Notice of Appeal . . . $105.00 (includes $5.00 fee for notice of appeal and $100.00 Court of Appeals filing fee)".

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

87-1475

SPERRY CORPORATION,
Plaintiff-Appellee,

v.

THE UNITED STATES,
Defendant-Appellant.

Before FRIEDMAN, NEWMAN, and BISSELL, *Circuit Judges.*

ORDER

A petition for rehearing having been filed in this case, and a response thereto having been invited by the court and filed,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and same hereby is denied.

The suggestion for rehearing in banc is under consideration.

FOR THE COURT:

/s/ Francis X. Gindhart
FRANCIS X. GINDHART,
Clerk

[Filed June 9, 1988]

cc: Ms. E. Kathleen Shahan, DOJ
Mr. Clarence T. Kipps

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

87-1475

SPERRY CORPORATION,
Plaintiff-Appellee,

v.

THE UNITED STATES,
Defendant-Appellant.

JUDGMENT

ON APPEAL from the United States Claims Court *in CASE NO(S).* 116-84C

This CAUSE having been heard and considered, it is ORDERED and *ADJUDGED:* REVERSED

ENTERED BY ORDER OF THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

DATED Apr 21, 1988

Issued as a Mandate: June 16, 1988

Costs: Against; Appellee

Printing $648.64

Total $648.64

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

87-1475

SPERRY CORPORATION,
Plaintiff-Appellee,

v.

THE UNITED STATES,
Defendant-Appellant.

ORDER

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc is declined.

[Filed June 21, 1988]

FOR THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

cc: Ms. E. Kathleen Shahan, DOJ
Mr. Clarence T. Kipps

APPENDIX H

12 Mar. 1976

DEPARTMENT OF THE AIR FORCE

HEADQUARTERS ELECTRONIC SYSTEMS DIVISION (AFSC)
Hanscom Air Force Base, Massachusetts 01731

Reply to Attn of: PPXPL

Subject: Contract F19628-74-C-0098 (AN/TRN-38) (V)—Assignment of Field Contract Administration Support

To: NAVPRO
Attn: Mr. A. Sliffman, ACO
Sperry Gyroscope Division
Lakeville Road and Marcus Avenue
Great Neck, NY 11020

1. Subject contract provides that final acceptance of the entire Ground Chain shall take place at the completion of DT&E (field) Testing. The DT&E Testing will take place at the following sites:

Segment	*Site Location*
Monitor Synchronizer Group	Site A-21 Eglin AFB, FL
Transmitter Group	Raiford State Prison, Starke, FL
Transmitter Group	Kisatchie National Forest, LA
Transmitter Group	Pelham Range, Ft McClellan, AL

2. In view of the above, a *redelegation* of certain CAO responsibilities would appear to be in order. It is therefore requested that consideration be given to redelegation of the following items and such other as deemed appropriate.

a. *Quality Assurance*:

(1) Identify and report deficiencies, problems, and failures to primary QAR and to Air Force Test Director.

(2) Notify Test Director and primary QAR immediately of any critical or serious problems.

(3) Initiate deficiency reports and maintain effective follow-up actions to assure reported discrepancies are resolved.

(4) Assure that the contractor conforms to established field Quality Assurance procedures (under MIL-Q-9858A).

(5) Participate as member of inspection/test team responsible to the Test Director for verification of tests performed under the Category II Test Plan and Procedures and to determine degree of compliance with requirements, exceptions, non-compliance, marginal areas, non-availability of required equipment, material, documentation or other resources.

b. *Configuration Management*:

(1) Assure all changes made to the hardware are reflected on applicable drawings.

(2) Track all Equipment Change Orders (ECO) and report to the SPO Configuration Manager the following:

(a) Accomplishment of the ECO.

(b) Any problem resulting from installation of any ECO.

c. *Control of Government Furnished Property*:

(1) Assure that Government property in the possession of the contractor is maintained and utilized in accordance with terms of the contract.

d. *Acceptance*:

(1) Assure contractor has the required documentation (test procedures, drawings, schematics, etc.) available and on hand for review and verification.

(2) Prepare a list of known shortages, deviations, exceptions, unfinished and/or unaccomplished tasks, etc., for submission to the Test Director and Contracting Officer.

(3) Provide recommendations relative to the impact of each condition noted (waiver, exception, engineering change) on performance, cost, interchangeability, etc.

(4) Validate or certify that:

(a) Engineering inspection/tests, as delegated, are accomplished in accordance with applicable contract requirements.

(b) Test equipment was calibrated in accordance with established requirements.

(c) Engineering inspection/test data are properly recorded by the contractor.

(d) All modifications installed to correct failures occurring during the conduct of Government acceptance procedures are approved and properly documented.

(5) Request and receive from the chairman of the SPO engineering/test team, recommendations relative to acceptance, rejection, or acceptance with reservations, based on observations and analysis of data.

(6) Accomplish DD Form 250 indicating acceptance based on the contractor's fulfillment of all contractual requirements as approved by the LORAN Field Test Site Director.

(7) Withhold signature of the DD Form 250 when shortages, discrepancies, waivers, or other departures

from contract requirements exist, unless authorized by the Contracting Officer.

(8) Complete and distribute the DD Form 250 in accordance with ASPR Appendix I and other supplementing direction contained in the contract. This function will be performed on notification by the program manager that all exceptions have been accomplished and then only after verification that contractor's corrective action is acceptable.

(9) Maintain records which reflect condition and status of the system at time of acceptance for submission to the program manager. This includes necessary validations and verifications from any other Government agencies participating in the acceptance.

/s/ L. E. Carr
L. E. CARR
Contracting Officer
Directorate of Procurement
Control and Communications Systems

Supreme Court, U.S.
FILED
NOV 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-410

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNISYS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-410

UNISYS CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in determining that the government timely exercised its contract option to purchase additional "LORAN-D" ground chains within 120 days of accepting the first such chain.

1. a. In January 1974, the government contracted with petitioner[1] for the design, fabrication, testing, and delivery of one LORAN-D ground chain, an advanced transportable, computer controlled, solid state long-range (LORAN) navigation system (Pet. App. 2a). The contract gave the government the option to purchase as many as three additional ground chains, at specified prices (*id.* at

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[1] Prior to its November 12, 1986, merger with Burroughs Corporation, petitioner Unisys was known as Sperry Corporation. See Pet. 1 n.1.

3a). To be effective, the option had to be exercised " ' "within 120 days after final acceptance by the Government" ' " of the first chain (*ibid.* (citation omitted)).

The contract required petitioner to conduct an extensive series of tests on the equipment, including processes called Development, Test and Evaluation (DT&E); Physical Configuration Audit (PCA); Functional Configuration Audit (FCA); and Formal Qualification Review (FQR) (Pet. App. 2a-3a). The DT&E tests were completed on February 3, 1978. The FCA, FQR, and the field portion of the PCA were all completed by March 1, 1978 (*id.* at 3a). On March 18, 1978, petitioner completed refurbishing of the test site and the equipment (*ibid.*). Final government inspection took place from February 27 to March 18, 1978, and on March 20, 1978, the government executed a DDForm 250 accepting the LORAN-D chain (*ibid.*). "Execution of the DD 250 is the recognized method for acceptance in Government contracts" (*id.* at 56a).

The government exercised its option on July 6, 1978, within 120 days of March 20, 1978, the date on which it had executed the DD Form 250 accepting the first chain (Pet. App. 3a).[2] Petitioner contended, however, that the government had accepted the LORAN-D upon completion of DT&E testing on February 3, 1978, more than 120 days before July 6, 1978. It therefore asserted that the option had not been timely exercised. *Id.* at 4a. Petitioner claimed that it was entitled to an equitable price adjustment, and it supplied two additional chains under protest (*ibid.*).

b. Petitioner's claim for the adjustment was denied by the contracting officer (Pet. App. 4a). The Board thereafter denied petitioner's appeal from that ruling (*id.* at

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[2] Petitioner received the document exercising the option on July 14, 1978, 116 days after the March 20, 1978 execution of the DD Form 250 (Pet. App. 57a).

40a-76a). The Board concluded from the available evidence that the government had accepted the chain on March 20, 1978, when it executed the DD Form 250 (*id.* at 64a-72a).[3]

c. The Claims Court reversed (Pet. App. 15a-39a). The court found (*id.* at 30a) that the terms of the contract were "inconsistent" and could not "be harmonized." It therefore applied the "Order Of Precedence" provision in the contract, which designates which among the contract terms shall take precedence in the event of an inconsistency.[4] Based on that provision, the court looked to the "Inspection at origin" clause to supply the date of acceptance. That clause states: "Final inspection and acceptance upon successful completion of DT&E Field Test at destination" (*id.* at 4a). The court acknowledged that "[i]t may well be that execution of a DD250 is the generally recognized method for acceptance of an item in government contracting" (*id.* at 33a). It noted, however, that parties may "agree to another form of acceptance" (*ibid.*). Relying on the "Inspection at origin" clause, the Claims Court held that the government's acceptance of the equipment had

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[3] Board Member Gomez dissented (Pet. App. 75a-76a). In his view, the government had accepted the equipment when the DT&E tests were completed, and thus the exercise of the option was untimely.

[4] Special Provision 5 of Section J of the Contract, ORDER OF PRECEDENCE, provides (Pet. App. 5a):

> In the even[t] of an inconsistency in this contract, unless otherwise provided herein, the inconsistency shall be resolved by giving precedence in the following descending order: 1) Schedule (excluding Statement of Work, the Specifications, and Contract Data Requirements List); 2) General Provisions; 3) the other provisions of the contract whether incorporated by reference or otherwise; 4) Statement of Work; 5) Contract Data Requirements List; 6) the Specifications * * *; 7) The Contractor's Technical Proposal as described in Section F.

occurred on March 1, 1978, when the DT&E testing was completed (*id.* at 38a).[5] The Claims Court accordingly concluded that the government's exercise of the option was untimely (*id.* at 39a). After remanding for a determination of damages, the Claims Court entered final judgment against the government in an amount stipulated by the parties (*id.* at 4a).

2. The court of appeals reversed (Pet. App. 1a-12a), holding that the government had accepted the first LORAN-D chain on March 20, 1978, when it signed the DD Form 250. The court found no need to resort to the "Order of Precedence" clause, because, as the Board had noted, " 'it is possible to harmonize all contract provisions relating to * * * acceptance without creating conflicts between them or rendering some of the provisions meaningless' " (*id.* at 5a (citation omitted)). The court first held that the "Inspection at [o]rigin" clause "does not provide that completion of DT&E testing itself constituted final acceptance by the government" (*id.* at 7a). Rather, the court explained (*ibid.*) that "in this context" the word "upon" in the Inspection at origin clause is properly construed to mean "shortly afterward." Thus, the court concluded, the Inspection at origin clause does not "indicate that the parties intended in this contract to depart from the usual procedure that government acceptance would 'be evidenced by execution of an acceptance certificate on the applicable inspection and receiving report form [here DD Form 250]' " (*ibid.* (brackets in original)). The court also found (*id.* at 11a-12a) that the actions of the parties during performance of the contract confirmed that acceptance by the government required that the government execute a

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[5] The Claims Court selected March 1, 1978, rather than February 3, 1978, as the date of acceptance, because it found (Pet. App. 32a) that the FCA, FQR, and PCA tests were all part of the DT&E testing.

Form DD250. In particular, the court noted (*id.* at 12a) that in an April 20, 1978, letter to the government, petitioner had acknowledged that the chain "was formally accepted * * * on March 20, 1978," the date on which the DD250 was signed.[6]

3. The decision of the court of appeals is correct and does not conflict with any decision of this Court or any court of appeals. Moreover, the case involves a fact-bound challenge to the construction of a particular government contract. Further review by this Court is unwarranted.

Congress designed the Federal Circuit to be the arbiter of " 'all federal contract appeals in which the United States is a defendant.' " *United States* v. *Hohri,* No. 86-510 (June 1, 1987), slip op. 7 (quoting H.R. Rep. 97-312, 97th Cong., 1st Sess. 18 (1981); H.R. Rep. 96-1300, 96th Cong., 2d Sess. 16 (1980)). In creating the Federal Circuit, Congress sought a mechanism for " 'prompt, definitive answer[s] to [contract] questions,' " where in the past the law had not been uniformly applied among the appellate courts. *United States* v. *Hohri,* slip op. 7 (quoting S. Rep. 97-275, 97th Cong., 1st Sess. 3 (1981); S. Rep. 96-304, 96th Cong., 1st Sess. 9 (1979)). Exercising the authority granted to it by Congress, the Federal Circuit concluded in this case that the various "acceptance" clauses in the contract could be harmonized. The court therefore had no need to apply the Order of Precedence provision.

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[6] Judge Bissell concurred in the result (Pet. App. 13a-14a). He explained that acceptance by the government is ordinarily evidenced by the execution of a Form DD250 (*id.* at 13a). Judge Bissell therefore urged the adoption of a "bright line" rule that "acceptance occurs only through the execution of the DD250, or similar document, unless the contract *clearly* states otherwise" (*id.* at 13a-14a (emphasis in original)). Because, in his view, the contract was "too loosely worded" to overcome that presumption, Judge Bissell concluded that acceptance occurred when the DD250 was executed (*id.* at 14a).

Petitioner contends (Pet. 9-11) otherwise, claiming that the definition of "acceptance" in the Statement of Work clause cannot be squared with the definition of "acceptance" in the Correction of Deficiencies clause. Petitioner misconstrues those provisions. The Statement of Work clause provides for acceptance following successful completion of DT&E and correction of design deficiencies; the "Correction of Deficiencies" clause requires petitioner to correct all deficiencies discovered within twelve months after acceptance. Petitioner asserts (Pet. 10) that the first clause provides for acceptance after correction of deficiencies, while the latter provides that deficiencies must be corrected after acceptance of the product. Read in context, however, the Correction of Deficiencies clause simply requires petitioner to correct those defects that were not identified prior to acceptance. The two clauses are thus completely consistent, both with each other and with the "Inspection at origin" clause.

Because the terms of the contract are capable of being harmonized, the court of appeals had no basis for construing the contract against the drafter (see Pet. 12-14), or for adopting a strict construction of the options clause (Pet. 14-18). See *United States* v. *Seckinger*, 397 U.S. 203, 210 (1970) (quoting *Gelco Builders & Burjay Const. Co.* v. *United States*, 369 F.2d 992, 999-1000 (Ct. Cl. 1966)). Indeed, there was no need to construe the options clause at all, since only the definition of the term "acceptance" was at issue, and that term appeared in several places in the contract and had a commonly accepted meaning within the industry. To determine the appropriate definition therefore required the court to construe the contract as a whole, in the light of the dealings and understandings of the parties. The court's fact-bound resolution of that issue is correct. In fact, as the court below noted (Pet. App. 12a), petitioner itself acknowledged, in a letter dated April

20, 1978, that the chain had been "formally accepted * * * on March 20, 1978," the date on which the DD250 was signed (*ibid.*). There is accordingly no merit to petitioner's prediction that the court's decision will "create[ ] turmoil" (Pet. 18) and "open the 'floodgates' to endless litigation" (Pet. 8).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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OCTOBER TERM, 1988

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v.

UNITED STATES OF AMERICA
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The primary question now before the Court is whether the decision of the Federal Circuit does the harm to Government contracting and the disputes prevention and resolution processes stated in the Petition. If so, the writ should be granted.

The widely used Order of Precedence clause and Federal rule of construction against the drafter serve the dual role of disputes prevention and resolution. They have prevented mountains of litigation.

The clause resolves the numerous inevitable inconsistencies in Government contracts in accordance with the Government's predetermined order of precedence. The Federal Circuit's refusal to enforce the Order of Prec-

edence clause converts all these inconsistencies into disputes.

The failure of the Federal Circuit to apply the construction against the drafter rule is contrary to this Court's decision in *United States v. Seckinger*, 397 U.S. 203, 210 (1970) and numerous Court of Claims decisions. The Federal Circuit's decision contradicts the very reason for Congress giving that Court exclusive appellate jurisdiction in Government contract disputes.

The Memorandum For The United States In Opposision is totally non-responsive to Petitioner's primary reasons for granting the writ and only superficially responsive to the other reasons. In essence, the Government's Memorandum asserts that the decision of the Federal Circuit is correct and "fact-bound." In reality, that decision is patently erroneous and presents important legal Government contract questions which the Government's Memorandum fails to address.

The Government's Memorandum and the Federal Circuit's decision describe the inspection and acceptance provision in the Schedule as an "Inspection at Origin" provision inferring that it is some obscure and irrelevant provision having nothing to do with acceptance. In contrast, Section I of the Schedule is entitled "Inspection and Acceptance" and is the only acceptance clause in the Schedule.

It is the Schedule that granted the option rights and provided for exercise of the option "within the period specified in the Schedule." That period was "not later than 120 days after final acceptance by the Government of Item 0001." Section I of the Schedule provided for final acceptance of Item 0001 to occur as follows: "Final inspection and acceptance upon successful completion of DT&E Field Test at destination." The Schedule also contained the Order of Precedence Clause that provided

that the Schedule provisions control over other inconsistent provisions.

The assertion in the Government's Memorandum that the acceptance provisions can be harmonized is sophistry. There is no way to harmonize February 3, 1978, March 20, 1978 and March 20, 1979 as a final acceptance date for Item 0001. The Schedule made the event that occurred on February 3, 1978 the final acceptance date for exercise of the option. March 20, 1978 would have been the normal acceptance date in the absence of a contrary acceptance date and the acceptance date under the correction of deficiencies clause could have been as late as March 20, 1979. There is no way to harmonize these dates. The Board and the Federal Circuit did not harmonize any of the acceptance provisions, but simply read the controlling acceptance provision out of the contract and used the normal time for acceptance. To say that these inconsistent provisions can be harmonized is arbitrary.

The assertion in the Government's Memorandum that the decision is "fact-bound" is wrong. The contract terms are dispositive of the case. The triggering mechanism for starting the 120-day period for option exercise was final acceptance of the first production unit and there were at least three different acceptance dates contained in the contract. The one specified as controlling was successful completion of DT&E Field Test at destination. It is undisputed that "successful completion of DT&E Field Test at destination" occurred on February 3, 1978 and that the Air Force's notice of option exercise was more than 120 days thereafter. Under the terms of the contract, the option was untimely.

The April 20, 1978 letter upon which the Federal Circuit and the Government Memorandum relied was written after the contractor had stated its contrary position, and was in the context of complying with the Government's

requests in order to receive payment for the equipment. Such an absurd reliance does not convert a legal question to a "fact-bound" question. In contrast, the Contracting Officer, before the dispute arose, interpreted the contract the same as the contractor, i.e., that final acceptance would take place "at the completion of DT&E (field) Testing," which was February 3, 1978.

The attempt of the Government's Memorandum to distinguish this Court's decision in *United States v. Seckinger*, 397 U.S. 203 (1970) starts from a faulty premise. The Federal rule of construction against the drafter is applicable when there are inconsistent provisions and the interpretation of the non-drafting party is reasonable. Thus, the rule is applicable in trying to harmonize inconsistent provisions.

The assertion that the strict construction of the option clause is inappropriate because only the definition of acceptance was at issue, is misplaced. The option rights were granted by the Schedule and the starting date for the options is certainly a part of the option rights. The final inspection and acceptance provision in the Schedule expressly started the 120-day option period. That provision was to be strictly—not liberally—construed.

It is therefore respectfully submitted that the writ of certiorari should be granted for the reasons stated in the Petition.

Respectfully submitted,

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